on July 18, 1927, said injunction being in words and figures as follows:

District Court of the United States, District of Rhode Island

HIGGINS MANUFACTURING COMPANY

vs.

FRANK A. PAGE, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE for the Collection District of Rhode Island, et al.

The President of the United States of America, to Frank A. Page, Individually and as Collector of Internal Revenue of the United States for the Collection District of Rhode Island, and His Deputies, Agents, and Successors, Greetings:

Know ye, that in the above-entitled cause a motion for the issuance of a writ of preliminary injunction has been duly
4 made, and the said motion, upon due consideration, has been granted by the court and such injunction ordered to issue:

Now, therefore, you are hereby restrained and enjoined, pending the hearing and determination of this cause, or until the further order of this court, from collecting, or attempting to collect, from the plaintiff any pretended tax or imposition purporting to be levied or assessed against the plaintiff under said oleomargarine act (act of August 2, 1886, chapter 840, 24 Stat. L. 209, as amended by act of May 9, 1902, chapter 784, sec. 332, Stat. L. 194) on account of the manufacture and sale of Higgins Nut Product; from seizing any of the property of the Higgins Manufacturing Company because an alleged tax of ten cents per pound on Higgins Nut Product has not been paid thereon; from distraining, seizing, entering upon, or attaching, or commencing any forfeiture proceedings against the property of the plaintiff because an alleged tax of ten cents per pound on Higgins Nut Product has not been paid; from enforcing any of the remedies provided for the collection of internal revenue of the United States against the plaintiff, its property, officers, or agents, and from notifying wholesale or retail dealers dealing in Higgins Nut Product in the collection district of Rhode Island, that they will incur liability to a specific tax as dealers in artificially colored oleomargarine or from making public announcement that Higgins Nut Product is liable to a tax imposed on colored oleomargarine or that said product will be seized.

Witness my hand and the seal of the District Court of the United States for the District of Rhode Island, at Providence, this 23rd day of July, A. D. 1927.

[SEAL.] (Signed) ALICE PECKHAM, *Clerk.*

That at the time of granting said injunction Judge Lowell rendered an opinion which is in words and figures as follows:

"District Court of the United States, District of Rhode Island

"Equity No. 270

"HIGGINS MANUFACTURING COMPANY

"*v.*

"FRANK A. PAGE

"OPINION

"(July 18, 1927)

"LOWELL, J.: This bill in equity was brought to restrain the collector of internal revenue for the district of Rhode Island from collecting a tax, alleged to be due under an act of Congress relating to oleomargarine, on Higgins Nut Product. The defendant filed a motion to dismiss.

5 "In the year 1922 the defendant notified the plaintiff that he was going to collect a tax on the product known as Nut-Z-All after all of it which had been made had been exhausted. The plaintiff paid the tax on a small quantity of this compound, and sued to get it back. Judge Brown in a very careful opinion (Higgins Mfg. Co. v. Page, 297 F. 644) decided that the tax was not due as the act of Congress did not subject the plaintiff's compound to a tax. There was no appeal from this decision.

"The bill of complaint in the case at bar—the allegations of which are admitted by the motion to dismiss—alleges that the compound now known as Higgins Nut Product is the same as Nut-Z-All; that the way in which it is put up is the same, and that all the circumstances of the case are identical with the one decided by Judge Brown. The bill further alleges that the defendant has notified the plaintiff that on the first of October, 1927, he will collect a tax of 10 cents a pound on Higgins Nut Product under the oleomargarine statute. We have, therefore, a case where the collector of internal revenue for the district of Rhode Island is threatening to take action which the court for that district has held to be illegal.

"At the hearing it was contended by the defendant that under Revised Laws 3224 (Comp. St. 5947) the court had no power to restrain the collection of the tax. This raises a serious question. It is alleged in the bill—and admitted by the motion to dismiss—that if the tax is laid and collected the business of the plaintiff will be ruined, because in an action at law brought after paying the tax it cannot recover adequate damages. The tax is so high that the plaintiff cannot afford to manufacture the compound, pay the tax and sell the article, and the alternative is to stop making it and destroy an established business.

"It is true, of course, that except under extraordinary circumstances a court cannot interfere with the assessment and collection of a tax. (See Graham v. Du Pont, 262 U. S. 234, and cases cited.) But the Supreme Court of the United States has said in Hill v. Wallace (259 U. S. 44):

"'It has been held by this court in Dodge v. Brady (240 U. S. 122, 126) that section 3224 of the Revised Statutes does not prevent an injunction in a case apparently within its terms in which some extraordinary and entirely exceptional circumstances make its provisions inapplicable. (259 U. S. at p. 62. See also Acklin v. People's Sav. Assn., 293 F. 392, 394, Lafayette Worsted Co. v. Page, 6 F. (2nd) 399.)'

"It is true, as contended by the defendant, that the statement was not necessary for the decision of the case (see 159 U. S. at pp. 62 and 63), but the statement of the court deserves all the greater attention from that fact, as it evidently wished to draw attention to the matter.

"The case at bar seems to be one coming within the exception above stated by the Supreme Court of the United States. The circumstances are exactly the same as in Higgins Mfg. Co. v. Page, ubi supra. There has been no change in the congressional
6 statute relating to oleomargarine. The action threatened by the collector of internal revenue for Rhode Island is therefore in defiance of the decision of the court. This is an extraordinary situation and calls for the interposition of injunctive relief. If it is true—as contended by the defendant—that a tax may be collected, although it has been judicially determined to be illegal, the result will be that the taxing authorities are entirely above and beyond the law. Although the Supreme Court of the United States has held that a tax laid under an unconstitutional statute will not be restrained (see Bailey v. George, 259 U. S. 16), in that case there was a complete and adequate remedy at law. It should be noted also that the statute had not been held void until after the tax was assessed. The taxing power is essential to the existence of the Government, and the courts have rightly gone very far in holding that taxing authorities should not be interfered with. (Snyder v. Marks, 109 U. S. 189, and cases cited.) But in this case, where there is no adequate remedy at law, the court should have power to grant relief; otherwise the citizens will be more at the mercy of the departments of the National Government than is consistent with life in a free country. (Acklin v. People's Sav. Assn., 293 F. at p. 394.)

"Motion to dismiss denied."

12. Plaintiff further states that in July, 1927, the Baltimore Butterine Company, of Baltimore, Maryland, petitioned the Supreme Court of the District of Columbia for a temporary and permanent injunction against said Blair and Estes to restrain them from endeavoring to enforce said Treasury Decision 4006 against its nut product, Nu-ine, which was identical in content and appearance with plaintiff's Southern Nut Product and which was in content and

which was in content and appearance identical with Nut-Z-All. After hearing and due consideration Justice Jennings Bailey of that court granted an injunction pendente lite and rendered an opinion which is in words and figures as follows, to wit:

"I agree with the reasoning of the decision of Judge Lowell of the District Court of Rhode Island in Higgins Manufacturing Co. v. Page; that is one of the cases to which the Supreme Court referred in Dodge v. Brady (240 U. S. 122) of extraordinary and exceptional circumstances.

"The bill alleges that the substance Nu-ine involved in this case is the same as Nut-Z-All, which Judge Brown of the District Court held not subject to taxation under the oleomargarine act. Yet in spite of this judicial holding the defendant has attempted by a regulation to make all substances like to that involved in this suit taxable under the act. It is clear that the defendant by means of a mere regulation cannot enlarge the provisions of the act, and such a regulation cannot be enforced. There would be no end to litigation if the defendant should persist in levying a tax after the courts have held the tax invalid, and the injury to the plaintiff would be irreparable and the amount inascertainable.

7 "The injunction will issue as prayed, restraining, pendente lite, the defendant from enforcing Treasury Decision No. 4006 in so far as it may apply to Nu-ine."

On December 16, 1927, the same court, by Justice A. A. Hoehling, made said injunction permanent, the final decree being in words and figures as follows:

In the Supreme Court of the District of Columbia

Holding an Equity Court

THE BALTIMORE BUTTERINE COMPANY, A CORPORATION, PLAINTIFF

vs.

ANDREW W. MELLON, SECRETARY OF THE TREASURY; DAVID H. BLAIR, Commissioner of Internal Revenue; R. M. Estes, Deputy Commissioner of Internal Revenue, defendants

FINAL DECREE

This cause coming on for final hearing, the plaintiff moved that, upon the pleadings and law applicable, the injunction pendente lite heretofore issued be made permanent; thereupon counsel for both sides having been heard and the matter having been considered by the court,

It is, this 16th day of December, A. D. 1927, adjudged, ordered, and decreed that the injunction pendente lite heretofore issued in this cause be, and the same hereby is, made permanent.

By the court.

A. A. HOEHLING,
Associate Justice.

In December, 1927, Judge Lowell made permanent the temporary injunction theretofore granted against the said Frank A. Page, collector of internal revenue for the district of Rhode Island, as set out above. No appeals were taken by the Government from any of the above-mentioned decrees.

13. Plaintiff further states that, relying upon the said first decision in the case of Higgins v. Page, said Treasury Decision 3590, said letter of R. M. Estes, and the said injunctions set out above, it was warranted in believing that the question had been judicially determined and that such products were not oleomargarine and not taxable as such, and it therefore engaged in the manufacture of Southern Nut Product. To further safeguard its business, however, plaintiff made inquiry of defendant and was advised by letter that Southern Nut Product would not be taxable as oleomargarine, said letter reading in part as follows:

"The Standard Nut Margarine Company has the same privilege of making a compound of the kind in question without taxpaying same as oleomargarine as is being enjoined by those manufacturers who obtain favorable decisions from the courts.

8 Upon receiving this letter, plaintiff began the manufacture of Southern Nut Product and has continued its manufacture in the same manner and of the same ingredients.

14. Plaintiff further states that on or about May 13, 1929, the Hon. William H. Barrett, United States district judge for the Southern District of Georgia, in a case involving the question whether Southern Nut Product was an imitation of butter, decided that it was not an imitation of anything, saying:

"It must be borne in mind throughout that this article when placed in the streams of commerce by its manufacturer and when purchased by the consumer had nothing on its container to indicate that it was an imitation of anything, and certainly not of creamery butter. Instead of by implication or otherwise claiming to be the product of milk or cream it is affirmatively in its name indicated that it was derived from nut. Not only did its name thus affirmatively indicate that it was no imitation of creamery butter but in extenso the words on the carton declared 'This product is made from the very best vegetable fats and cannot be excelled for cooking, baking, and shortening.' The alleged elements of imitation are (a) it is in square cartons containing one pound, (b) the pound is divided into four quarter-pound cubes, and (c) it is colored exactly like creamery butter. It hardly could be contended that an article of food should not be sold in pound packages because some other article of food was sold in pound packages, and it could hardly be contended that the adoption of the plan of dividing a pound of food into four cubes preempted such practice as against all other food producers, and it can hardly be contended that the color of creamery butter, even though it were always the same (contrary to the evidence), would preempt it as against all other foods of such color. It does not appear in the 'conclusion,' nor was it urged at the hearing, that there was any reason

for any purchaser of a carton of Southern Nut Product to be deceived into thinking that it was creamery butter. Apparently the defendant and Attorney General dealt with this as a package, for the language of the finding is that 'it is an imitation in package of another substance.' It is at least doubtful whether the sale in packages of a substance manufactured and put into commerce so marked as to prevent any reasonable conclusion that it was intended as an imitation of another article of food would come under the ban of this act because perchance some purchaser might, either as purchased or in some other way, use it either as an imitation of or as a substitute for another article of food."

15. Plaintiff further states that notwithstanding all of the above facts, defendant has threatened and still threatens to collect a tax of 10¢ per pound upon Southern Nut Product as upon the manufacture of artificially colored oleomargarine, his authority for such action being a letter addressed to him by R. M. Estes, Deputy Commissioner of Internal Revenue, reading as follows:

9 MT-M-JHY.

Collector of Internal Revenue, Jacksonville, Fla.

The Standard Nut Margarine Company of Florida, 1427 Kings Road, Jacksonville, Fla., manufactures a so-called colored cooking compound under the name of "Southern Nut Product" which is held to be taxable as colored oleomargarine.

This office has no knowledge as to the quantity of this product which the said company has manufactured and sold and hence it has been necessary to make an estimate of its production. Enclosed will be found supplemental miscellaneous assessment list for April on which the manufacturer has been assessed the sum of $5,000.00 which covers the tax on 50,000 pounds estimated to have been produced during the month of January, 1929.

It is requested that the notice and demand on this assessment be delivered personally by a deputy collector and that he be instructed to make an examination of the books and records of the company to determine the exact quantity of the Southern Nut Product manufactured and sold from the time business was commenced to date, and to advise the company that the assessment will be adjusted to correspond thereto. This data should be forwarded to this office promptly and an additional assessment will be made. Should the deputy be refused permission to make an examination of the company's books and records, this office should be advised at once and further instructions will be issued.

If it becomes necessary to issue a distraint warrant on this assessment, it is requested that you communicate with this office before doing so.

All wholesale and retail dealers in Southern Nut Products and other so-called colored cooking compounds found on the market in your district should be reported for assessment on subsequent lists

unless they hold special tax stamps permitting them to sell colored oleomargarine.

R. M. Estes, *Deputy Commissioner.*

ba.
Incl.

16. Plaintiff further states that in the manufacture and sale of Southern Nut Product the net profit derived is approximately three cents per pound, and that unless immediate relief shall be granted by this honorable court, the levy and collection of ten cents per pound tax upon the said product heretofore and now being manufactured by plaintiff will render plaintiff insolvent, and in addition make it liable to severe criminal penalties and the forfeiture of its factory and plant in which said product is made, together with all raw materials and manufactured product on hand. That in addition thereto said demand will render hundreds of wholesalers and thousands of retailers who have been and are now handling and selling plaintiff's product liable to said special tax, additional penalties, and severe criminal liabilities.

17. Plaintiff further states that it is without adequate remedy at law, for the reason that a tax of ten cents per pound upon the amount of Southern Nut Product which plaintiff has heretofore manufactured and sold would amount to such an enormous sum that it would be impossible for plaintiff to pay the same to defendant and sue to recover, and that it is without any remedy save in a court of equity; that it is suffering immediate and irreparable injury and loss of property rights, and will continue to so suffer unless the relief prayed for herein shall be granted; that the said demands for taxes and special license fees which have already been made have completely demoralized the business of plaintiff throughout the territory in which said product has been marketed, and particularly the territory within the jurisdiction of this court; that the dealers and agents of plaintiff, fearing the severe taxes and penalties demanded by defendant and his agents carrying out his instructions, have ceased their purchases of plaintiff's product, have cancelled existing orders for same, have returned goods on hand, and have substituted other products therefor, and unless the relief prayed for herein shall be granted forthwith that the business of plaintiff will be entirely destroyed. Because of the great difference between the amount of tax per pound sought to be collected and the net amount of profit per pound on this product, plaintiff is not financially able to pay such tax and sue to recover, and if the proposed tax shall be imposed it will entirely destroy the business of plaintiff, which has been built up at great effort and expense, and with the knowledge and approval of the defendant. Furthermore, unless the relief prayed for herein be granted the valuable good will of plaintiff will be destroyed and its employees will be forced to see other employment.

18. Plaintiff further states that it sells its product to a great many wholesalers and retailers throughout the territory within the jurisdiction of this court, and that unless restrained by this honorable

court as prayed herein, defendant will subject plaintiff and its dealers to a multiplicity of suits.

19. Plaintiff further states that the attempt of defendant herein to make Southern Nut Product taxable as artificially colored oleomargarine will deprive plaintiff of its property without due process of law, as guaranteed by the Constitution of the United States, for the reason that the act of August 2, 1886 (sec. 14.), provides for a method of determining what substances submitted to the Commissioner of Internal Revenue for analysis shall be considered oleomargarine for the purpose of taxation. Said commissioner has heretofore so analyzed and inspected products similar to Southern Nut Product, and made final decision according to said law holding that said products are not taxable as artificially colored oleomargarine.

20. Plaintiff further states that section 14 of the act of August 2, 1886, is in part as follows:

11 "SEC. 14. That there shall be in the office of the Commissioner of Internal Revenue an analytical chemist and a microscopist, who shall each be appointed by the Secretary of the Treasury, and shall each receive a salary of two thousand five hundred dollars per annum; and the Commissioner of Internal Revenue may, whenever in his judgment the necessities of the service so require, employ chemists and microscopists, to be paid such compensation as he may deem proper, not exceeding in the aggregate any appropriation made for that purpose. And such commissioner is authorized to decide what substances, extracts, mixtures, or compounds which may be submitted for his inspection in contested cases are to be taxed under this act; and his decision in matters of taxation under this act shall be final. * * *"

21. Plaintiff further states that section 2 of the act of August 2, 1886, as passed by Congress, is as follows:

"SEC. 2 (act Aug. 2, 1886). That for the purposes of this act certain manufactured substances, certain extracts, and certain mixtures and compounds, including such mixtures and compounds with butter, shall be known and designated as 'oleomargarine,' namely, all substances heretofore known as oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine, and neutral; all mixtures and compounds of oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine, and neutral; all lard extracts and tallow extracts; and all mixtures and compounds of tallow beef fat, suet, lard, lard-oil, vegetable oil, annatto, and other coloring matter, intestinal fat, and offal fat made in imitation of semblance of butter, or when so made, calculated, or intended to be sold as butter, or for butter."

22. Plaintiff further states that Southern Nut Product is composed entirely of vegetable oils, salt, water, and harmless coloring matter, the same as the products Nut-Z-All and Nu-ine, there being no element of animal nature contained therein. That under the provisions of section 2 of the said act of August 2, 1886, as passed by Congress, only animal elements were included in the definition of oleomargarine; and that the act of defendant in attempting to make taxable

products composed entirely of vegetable ingredients is not justified or authorized by said act.

23. Plaintiff further states that said act of August 2, 1886, as amended, is unconstitutional and void in that it amounts to penalizing, under the guise of a tax, the manufacturers of oleomargarine in order that they may not compete with the manufacturers of butter, the so-called tax being a penalty and beyond the power of Congress to inflict.

24. Plaintiff further states that said act of August 2, 1886, as amended, on its face provides that any substance composed of certain-named ingredients shall be known as oleomargarine, if it is made in imitation or semblance of butter or if it is calculated or intended to be sold as or for butter, and if it contains artificial coloration which causes it to look like butter, it is subject to a penalty in the guise of a tax to the amount of ten cents, thus
12 eliminating all competition with butter rather than levying a tax, said object not being one of the powers granted to Congress by the Constitution of the United States.

25. Plaintiff further states that said act of August 2, 1886, as amended, is unconstitutional and void in that Congress has power to lay and collect taxes only to pay the debts of the United States, or, in other words, for revenue only, and that the object of said act was not to lay a tax to pay the debts of the United States, but was, as the history of the act shows, to regulate the manufacture and sale of oleomargarine, to prevent the fraudulent sale of oleomargarine as butter, and to prevent the competition of oleomargarine with butter, none of which objects is within the powers granted to Congress by the Constitution of the United States, said act attempting to bring about the said results under the pretext of levying and in the guise of a tax.

26. Plaintiff further states that said act of August 2, 1886, as amended, is unconstitutional and void in that it taxes oleomargarine, which is made to look like butter of any shade of yellow by artificial coloration, ten cents per pound, and taxes oleomargarine which is made to look like butter of any shade of yellow by any other means than artificial coloration, only one-fourth cent per pound, such classification being arbitrary and unreasonable and depriving plaintiff of its property without due process of law.

27. Plaintiff further states that said act of August 2, 1886, as amended, is unconstitutional and void in that it taxes oleomargarine containing artificial coloration ten cents per pound, and provides that butter containing artificial coloration may be manufactured and sold free from any tax whatsoever, such classification being arbitrary and unreasonable and depriving plaintiff of its property without due process of law.

28. Plaintiff further states that said act of August 2, 1886, as amended, is unconstitutional and void in that it is so vague and uncertain as not to inform plaintiff and manufacturers generally as to what combinations, substances, or mixtures constitute oleomar-

garine, said act being limited to certain named ingredients which were known as such ingredients prior to August 2, 1886.

29. Plaintiff further states that said act of August 2, 1886, as amended, is unconstitutional and void in that it attempts by a so-called tax to regulate an activity which is entirely within the jurisdiction of the States and subject only to the police power of the State, not being one of the powers granted to Congress by the Constitution of the United States but one which is reserved to the States and to the people thereof.

PRAYER

Wherefore plaintiff, being without remedy in the premises except in a court of equity, prays:

13 1. That writ of subpœna issue directed to the said defendant herein commanding him to appear and make full, true, and complete answer to this the plaintiff's petition, but not under oath, his said answer under oath being expressly waived, and to abide by and perform such orders or decrees as the court may make in the premises.

2. That the court order this cause to be heard on application for a preliminary injunction (hereby made) within ten days after the service hereof on said defendant, and that the court upon such application and hearing issue a preliminary injunction against the defendant, his agents, assistants, deputies, and employees, enjoining them, pending final hearing of this cause, from collecting, or attempting to collect, directly or indirectly, from the plaintiff, or any dealer selling plaintiff's product, Southern Nut Product, any pretended tax or imposition purporting to be levied or assessed against the plaintiff or said dealers under the oleomargarine act (act of August 2, 1886, chapter 840, 24 Stat. L. 209, as amended by act of May 9, 1902, chapter 784, sec. 332, Stat. L. 194), on account of the manufacture and sale of the said Southern Nut Product, referred to in the petition herein and manufactured by plaintiff; from seizing any of the property of plaintiff herein because an alleged tax of ten cents per pound on the said Southern Nut Product manufactured by plaintiff has not been paid; from distraining, seizing, entering upon, or attaching, or commencing any forfeiture proceedings against the property of plaintiff because an alleged tax of ten cents per pound has not been paid on the said Southern Nut Product manufactured by plaintiff; from enforcing any of the remedies provided for the collection of internal revenue of the United States against plaintiff, its property, officers, agents, or dealers, with respect to said Southern Nut Product; from notifying wholesale or retail dealers in said Southern Nut Product that because of the sale of the said product of plaintiff they will incur liability to a specific tax as dealers in artificially colored oleomargarine; and from making public announcement that the said product manufactured by plaintiff herein is liable to the tax imposed on artificially colored oleomargarine.

3. That upon final hearing of this cause the court order, adjudge, and decree that the defendant, his agents, assistants, deputies, and employees be perpetually enjoined from directly or indirectly collecting or attempting to collect from the plaintiff, or any dealers selling plaintiff's product Southern Nut Product, any pretended tax or imposition purporting to be levied or assessed against the plaintiff or said dealers under the oleomargarine act (act of August 2, 1886, chapter 840, 24 Stat. L. 209, as amended by act of May 9, 1902, chapter 784, sec. 332, Stat. L. 194) on account of the manufacture and sale of the said Southern Nut Product referred to in the petition herein and manufactured by plaintiff; from seizing any of the property of plaintiff herein because an alleged tax of ten cents per
14 pound on the said Southern Nut Product manufactured by plaintiff has not been paid; from distraining, seizing upon, entering upon, or attaching, or commencing any forfeiture proceedings against the property of plaintiff; because an alleged tax of 10¢ per pound has not been paid on the said Southern Nut Product manufactured by plaintiff; from enforcing any of the remedies provided for the collection of internal revenue of the United States against the plaintiff, its property, officers, agents, or dealers, with respect to said Southern Nut Product; and from notifying wholesale or retail dealers in said Southern Nut Product that because of the sale of the said product of plaintiff they will incur liability to a specific tax as dealers in artificially colored oleomargarine; and from making public announcement that the said product manufactured by plaintiff herein is liable to the tax imposed on artificially colored oleomargarine.

4. That plaintiff have such other, further, and general relief as the nature of the case may require, and the court may deem just and proper in the premises.

[SEAL.]

STANDARD NUT MARGARINE CO. OF FLORIDA,
By W. E. NICHOLSON, *Secy.-Treas.*

GEO. N. MURDOCK,
MILAM, MCILVAINE & MILAM,
By E. T. MCILVAINE,
Attorneys for Plaintiff.

[*Duly sworn to by W. E. Nicholson; jurat omitted in printing.*]

Affidavit.

File endorsement omitted.

[On carton:] One pound net, "Southern" Nut Product, Artificially Colored. This product is sold to you entirely on its merits as a nut product made from cocoanut oil, peanut oil, water,
15 and salt and it is not sold as a substitute for any other product. For cooking, baking, and seasoning. Keep in a cool dry place. Standard Nut Margarine Co. of Florida, Jacksonville, Fla.

(Filed Dec. 26, 1926, Jacksonville, Fla. Edwin R. Williams, clerk.)

On December 27th, A. D. 1929, a chancery subpœna was issued in this court directed to Peter H. Miller, individually and as collector of internal revenue for the district of Florida, and on January 2nd, 1930, said subpœna was returned executed by the U. S. marshal.

In United States District Court

[Title omitted.]

Answer

Filed Jan. 7, 1930

The defendant, Peter H. Miller, individually and as collector of internal revenue for the district of Florida, files this his answer to the bill of complaint herein, reserving unto himself the benefit of all necessary objections and exceptions to the errors and insufficiencies of said bill and the jurisdiction of the court, nevertheless answering so much and such parts of the bill as he is advised is material or necessary for him to answer, that is to say:

1. He admits the allegations of paragraph 1 of plaintiff's bill.
2. He admits the allegations of paragraph 2 of plaintiff's bill.
3. He admits the allegations of paragraph 3 of plaintiff's bill.
4. In answer to paragraph 4 of plaintiff's bill, he denies any knowledge or information sufficient to form a belief as to the averments therein contained and neither admits nor denies the same.
5. Answering paragraph 5 of the bill, defendant admits that plaintiff is engaged in the manufacture and sale of a nut product known as Southern Nut Product, manufactured and sold under its distinctive name; denies any knowledge or information sufficient to form a belief as to whether said name is in imitation of the distinctive name of any other product or not; he admits that the name is
16 accompanied on the label or brand with the name of the place where it is manufactured and produced; admits that said product contains no added poisonous or deleterious ingredients; admits that said product is a mixture or compound consisting of cocoanut oil, peanut oil, salt, and harmless coloring matter, but denies that the same is manufactured and sold for cooking, baking, and seasoning purposes, and affirmatively alleges that said product is manufactured, sold, and intended to be manufactured and sold in imitation or semblance of butter, and when so made, calculated, or intended to be sold as butter or for butter; defendant admits that said Southern Nut Product is packed in one-pound cartons similar to the sample attached to plaintiff's bill, but denies any knowledge or information sufficient to form a belief as to whether that is the only method or manner of packing said product; defendant denies any knowledge or information sufficient to form a belief as to whether plaintiff in the manufacture of said Southern Nut Product

buys the material so used in the said manufacture from a great many persons and firms located outside the State of Florida where the product is manufactured and sells and ships said product to a great number of firms and persons located in many States of the United States outside of the State of Florida, and, therefore, neither admits nor denies same.

6. Answering paragraph 6 of plaintiff's bill, defendant denies that plaintiff has been engaged in the manufacture of said Southern Nut Product for a period of two years, as alleged in said bill, and alleges that the plaintiff has not been engaged in such manufacture for a period of much over a year; defendant admits that plaintiff operates a plant and maintains offices in the city of Jacksonville and denies any knowledge or information sufficient to form a belief as to whether plaintiff had built up a reputation and standing for fair dealing with its customers and other people with whom it has done business.

7. Answering paragraph 7 of plaintiff's bill, defendant admits that prior to time plaintiff engaged in the manufacture and sale of said Southern Nut Product an action at law had been brought against one Page, collector of internal revenue of the United States for the district of Rhode Island for the purpose of recovering from said collector taxes paid under protest by the Higgins Manufacturing Company on a product manufactured and sold by that company known as Nut-Z-All, but defendant denies that said Nut-Z-All was manufactured in the same way and with the same ingredients as Southern Nut Product is manufactured by the plaintiff herein, and defendant affirmatively alleges that said Southern Nut Product is manufactured in a different manner from that used in the manufacture of Nut-Z-All and that the same is sold in a different manner from Nut-Z-All and is not the same product as Nut-Z-All; defendant admits that after hearing the evidence submitted on behalf of both plaintiff and defendant in said Higgins Manu-
17 facturing Company case the court held that said Nut-Z-All was not made in imitation or semblance of butter, nor when so made, calculated, or intended to be sold as butter or for butter and that under the law the court held it was not oleomargarine and not taxable as oleomargarine; defendant admits that the decision in said case is found in volume 297 of Federal Reporter at page 644.

8. Answering paragraph 8 of plaintiff's bill, defendant admits that Treasury Decision 3590 was promulgated and published, but as to whether or not all concerned were informed that Nut-Z-All had been held by the court as not to be oleomargarine defendant denies any knowledge or information and neither admits nor denies the same.

9. Answering paragraph 9 of plaintiff's bill, defendant admits that in June, 1924, an organization or association of oleomargarine manufacturers, known as the Institute of Margarine Manufacturers, maintained headquarters in Washington, D. C., and that inquiry

was made by said institute to David H. Blair, then Commissioner of Internal Revenue, as to the taxability of said product, Nut-Z-All; defendant admits that a letter set forth in paragraph 9, signed by R. M. Estes, deputy commissioner, was addressed to the Institute of Margarine Manufacturers, dated August 20, 1924.

10. Answering paragraph 10 of plaintiff's bill, defendant admits that Treasury Decision 4006 was promulgated and published, but alleges that said Treasury Decision 4006 was revoked according to law and that the same had been revoked for some considerable period of time before the filing of this action and is no longer in force and effect.

11. Answering paragraph 11 of plaintiff's bill, defendant admits that in July of 1927 the Higgins Manufacturing Company, of Rhode Island, filed in the United States District Court for Rhode Island a petition for temporary injunction against one Page, collector of internal revenue for the district of Rhode Island, praying for a restraining order against the collector of internal revenue from collecting the tax on Nut-Z-All as oleomargarine; defendant admits that the temporary restraining order was issued in words and figures as set forth in said paragraph 11 of plaintiff's bill, and that Judge Lowell rendered an opinion in said cause as set forth in said paragraph 11.

12. Answering paragraph 12 of plaintiff's bill, the defendant admits that in July, 1927, the Baltimore Butterine Company filed a petition in the Supreme Court of the District of Columbia for a temporary and permanent injunction against Commissioner of Internal Revenue Blair and Deputy Commissioner of Internal Revenue Estes to restrain them from enforcing Treasury Decision 4006 against the products manufactured by said company known as Nu-ine; defendant denies that said Southern Nut Product is identical in content and appearance with said nut product Nu-ine, and further denies that said Southern Nut Product is identical in contents and appearance with Nut-Z-All, and defendant affirmatively alleges
18 that said product known as Southern Nut Product is a different product from Nu-ine and Nut-Z-All, and that said product known as Southern Nut Product is manufactured, sold, and marketed in a different method and manner from the manner and methods employed in the manufacture and sale of Nu-ine and Nut-Z-All; defendant admits that an injunction pendente lite was issued as set forth in paragraph 12 of said bill and that thereafter Justice Hoehling made said injunction permanent and that said injunction is in words and figures as set forth in paragraph 12 of plaintiff's bill.

13. Answering paragraph 13 of plaintiff's bill, defendant denies any knowledge or information sufficient to form a belief as to whether or not plaintiff relies upon said first decision in the Higgins case or Treasury Decision 3590, or the letter signed by R. M. Estes, or said injunction, before commencing to manufacture said product, or whether it began or continued to so manufacture as a result thereof and can therefore neither admit or deny the same; defendant affirma-

tively alleges that the plaintiff never submitted its product to the Commissioner of Internal Revenue as required by law, nor to defendant herein to ascertain whether or not this particular product, Southern Nut Product, manufactured by the plaintiff was subject to a tax or as to whether the Commissioner of Internal Revenue had determined the same to be oleomargarine and taxable as such.

14. Answering paragraph 14 of plaintiff's bill, defendant admits that a decision was rendered by Hon. William H. Barrett in the District Court for the Southern District of Georgia, but denies that said case involves the question as to whether said Southern Nut Product was taxable or nontaxable, and the defendant affirmatively alleges that the litigation there involved was not predicated under the act of Congress of August 2, 1886 (24 Stat. 209), as amended by the act of May 9, 1902 (32 Stat. 193), known as the oleomargarine law, nor was a construction of that law involved in said litigation, or the decision rendered therein, as set forth in paragraph 14 of plaintiff's bill.

15. Answering paragraph 15 of plaintiff's bill, defendant admits that he received a letter from R. M. Estes, Deputy Commissioner of Internal Revenue, as set forth and contained in said paragraph 15, but denies that he has threatened to collect the tax of ten cents per pound upon said Southern Nut Product.

16. Answering paragraph 16 of plaintiff's bill, the defendant denies any knowledge or information sufficient to form a belief as to whether the manufacture and sale of said product is approximately three cents per pound, and therefore neither admits or denies the same. He denies that unless plaintiff's petition be granted by this court the levy and collection of ten cents per pound tax upon the nut product already manufactured by plaintiff will render the plaintiff insolvent or subject it to severe penalties or the forfeiture of its factories or plants in which said products are made; defendant admits that said demand will render hundreds of wholesalers and retailers who are now handling and selling said products liable for taxes, but denies that it will subject them to severe criminal liability..

19 17. Answering paragraph 17 of plaintiff's bill, defendant denies that plaintiff has no adequate remedy at law and is without any remedy save in the court of equity, or that it is suffering immediate and irreparable loss of property rights, or will continue to so suffer unless the prayer here petitioned for be granted; defendant denies that the demands for taxes and special license fees have completely demoralized the business of plaintiff throughout the territory in which said products have been manufactured, and particularly the territory within the jurisdiction of this court; denies that dealers and agents of plaintiff, fearing severe taxes and penalties, have ceased their purchases of plaintiff's product and have canceled existing orders for same and that they have returned goods on hand and have substituted other products therefor, and defendant affirmatively alleges that if plaintiff's business has become demoralized throughout the territory and within the jurisdiction of this court and that

the dealers and agents of plaintiff fear severe taxes and penalties and have canceled orders and returned goods on hand and substituted other products therefor, it is by reason of the fact that the United States District Court for the Western Division of the Western District of Missouri in the case of Harrow-Taylor Butter Company, plaintiff, v. Noah Crooks, Collector of Internal Revenue for the Sixth District of Missouri, defendant, same being Cause No. 7569, held that a product manufactured and sold in practically the same manner and by virtue of the same means and processes as used by plaintiff to be oleomarg'ine and within the purview of the act of Congress of August 2, 1886 (24 Stat. 209), as amended by the act of May 9, 1902 (32 Stat. 193), known as the oleomarg'ine law; that by reason of said decision having been rendered as herein alleged by said court the entire trade engaged in the manufacture of vegetable oil products were advised of the decision holding said Rich-Nut shortening taxable at the rate of ten cents per pound; that as a result thereof all the manufacturers of said products in the United States ceased manufacturing said products and refrain from any further attempting to handle or sell any of said products and all persons handling said products were advised of said decision and were advised by counsel representing to stop the manufacture and sale; defendant denies any knowledge or information sufficient to form a belief, therefore can neither admit or deny, that because of the great difference in tax per pound sought to be collected and the net amount of profit per pound of said product plaintiff is not financially able to pay such tax and sue to recover; denies that if said tax is imposed it would destroy the business of plaintiff; denies that unless the relief prayed for in said bill be granted the good will of plaintiff will be destroyed and its employees forced to seek other employment.

18. Answering paragraph 18 of plaintiff's bill, defendant admits that plaintiff prior to the Harrow-Taylor decision did sell its products in many different collection districts of the United States, but as to whether it still so continues defendant denies any knowledge sufficient to form a belief; denies that unless restrained by this court plaintiff and its dealers will be subjected to a multiplicity of suits and various court proceedings.

19. Answering paragraph 19 of plaintiff's bill, defendant denies that an attempt to make said nut products taxable as artificially colored oleomargarine would deprive plaintiff of its property without due process of law as guaranteed by the Constitution of the United States; defendant admits that the act of August 2, 1886, provides a method of determining what substances submitted to the Commissioner of Internal Revenue for analysis shall be considered oleomargarine; defendant denies that said Commissioner of Internal Revenue has heretofore analyzed and inspected plaintiff's products on which taxes have been asserted and made final decisions according to law that said products were not taxable as artificially colored oleomargarine, and the defendant alleges that none of the products upon which a tax has now been asserted and payment of which is

now due has ever been determined by said defendant to be non-taxable.

20. Defendant admits paragraph 20 of plaintiff's bill.

21. Defendant admits paragraph 21 of plaintiff's bill.

22. Answering paragraph 22 of plaintiff's bill, defendant admits that plaintiff's products are composed of vegetable oils, salt, water, and harmless coloring matter, and admits that there is no element of animal nature contained therein, but denies that said products are the same as Nut-Z-All and Nu-ine and affirmatively alleges that said products are the same as Rich-Nut, which said product was held by the United States District Court in the case of Harrow-Taylor Butter Company v. Crooks taxable as oleomargarine; defendant denies that under the provisions of section 2 of the act of Congress of August 2, 1886, as passed by Congress, only animal elements were included in the definition of oleomargarine; defendant further denies that there is no justification or authorization by said act making said products composed entirely of vegetable ingredients taxable as oleomargarine, and the defendant affirmatively alleges that said act of August 2, 1886, as amended, includes in said definition defining oleomargarine such ingredients as are set forth and described in plaintiff's bill and used by plaintiff in manufacturing Southern Nut Product.

23. Answering paragraph 23, defendant denies that said act of August 2, 1886, as amended, is unconstitutional and void in that it amounts to penalizing under the guise of a tax the manufacturers of oleomargarine in order that they may not compete with the manufacturers of butter, and denies the so-called tax is a penalty and being beyond the power of Congress to impose, and the defendant affirmatively alleges that said act is constitutional and that the same is a revenue act and has so been held by the Supreme Court of the United States.

24. Answering paragraph 24 of plaintiff's bill, the defendant alleges that the averments in said paragraph are conclusions of the pleader and call for no answer from this defendant.

21 25. Answering paragraph 25 of plaintiff's bill, defendant denies that said act is unconstitutional and void, and alleges that the balance of the averments of said paragraph are conclusions of the pleader and do not require an answer.

26. Answering paragraph 26 of plaintiff's bill, the defendant denies that said act of August 2, 1886, as amended, is unconstitutional, and denies that plaintiff is deprived of its property without due process of law; as to the balance of the averments contained in said paragraph, defendant alleges that they are conclusions of the pleader and do not require an answer.

27. Answering paragraph 27, defendant denies the allegations therein contained.

28. Defendant denies the allegations set forth and contained in paragraph 28 of plaintiff's bill.

29. Answering paragraph 29, defendant denies the allegations therein contained.

The defendant further answering plaintiff's bill of complaint affirmatively alleges that the product set forth and described in plaintiff's bill, known as Southern Nut Product, upon which the taxes have been asserted, which are now due and owing by the plaintiff to the United States, are products manufactured by the plaintiff and placed on the market for and in imitation of butter and are sold in imitation of butter and in semblance of butter; that said products are purchased in the public market as imitation of butter and that said products so purchased are used by the public as imitation of butter; that said products are placed in the market in packages of the same size and character as butter, all of which is within the knowledge of the plaintiff; that the said products are not cooking compounds generally known and used by the trade as cooking compounds, and that said products are not sold to a cooking-compound trade, but that all of said products are sold to the butter trade and are handled by the trade the same as butter, and if said products are sold as cooking compounds they are sold and used as such the same as butter is used for a cooking compound; that said products are flavored similar to butter, thereby making said products so similar to butter in taste that none except experts can detect these imitations from real butter; that the method of adding artificial coloring to said products has been so perfected that it is impossible to detect these products from various grade of butter; that said products have a very similar texture to butter; and the defendant alleges that said products are products which are marketed, manufactured, and sold, and are intended to be marketed, manufactured, and sold, in imitation of and in semblance of butter, and that said products are marketed, manufactured, and sold in imitation of and in semblance of butter, all of which is well known by the plaintiff and so intended by the plaintiff and that same come within the provisions of the act of Con-
22 gress of August 2, 1886, as amended, and are, therefore, taxable; that said products so marketed and manufactured and upon which taxes have now been asserted and are now due and owing have been before the courts for adjudication; and action was instituted by this plaintiff and others in the Supreme Court of the District of Columbia against David H. Blair, Commissioner of Internal Revenue, same being Equity No. 49751, wherein this plaintiff upon the same facts and the same showing which is now being made to this court made application to the Hon. Justice Bailey, of the Supreme Court of the District of Columbia, for a temporary restraining order to restrain the commissioner from determining said products taxable and to enjoin the collection of the tax thereon and that upon an ex-party application a temporary restraining order was granted and a rule to show cause therein issued, whereupon the matter came before said court for hearing, and after a full presentation of the issues for both the plaintiffs and the defendants and the court being fully apprized in the premises vacated the temporary restraining order and denied plaintiff's motion for injunction pendente lite, all of which is res adjudicata as to the issues now before this court. Defendant further affirmatively alleges that the Har-

row-Taylor Butter Company, of Kansas City, likewise filed an action in the Supreme Court of the District of Columbia, same being entitled the Harrow-Taylor Butter Company v. Commissioner of Internal Revenue Blair, wherein proceedings were instituted for the purpose of enjoining the collection of said tax; that a temporary restraining order was granted and a rule to show cause issued; the matter was fully presented to the court by both sides, and thereafter the court vacated the temporary restraining order and denied an injunction pendente lite. The defendant further avers that subsequently a tax was asserted and collected against the said Harrow-Taylor Butter Company, of Kansas City, on its product, which is identical with the product manufactured by the plaintiff herein, and that the said Harrow-Taylor Butter Company filed a suit in the United States District Court of the Western Division of the Western District of Missouri against Noah Crooks, collector of the sixth collection district of the State of Missouri, said cause being No. 7569, for the recovery of said tax so collected; said cause was tried upon the merits, and after a full presentation the court found that said Rich-Nut shortening manufactured by the said Harrow-Taylor Butter Company, which said product the defendant alleges to be for the purposes of taxation the same as the product now being manufactured by the plaintiff to be taxable under the act of August 2, 1886, as amended, and rendered judgment in favor of the defendant.

Defendant further alleges that said taxes having been duly assessed according to law and coming within the provisions of the act of August 2, 1886, as amended, and that said products having been determined by the Commissioner of Internal Revenue to be taxable

23 the defendant is advised by counsel and therefore alleges that this court of equity is without jurisdiction to restrain the collection of said Federal taxes duly assessed pursuant to and in accordance with said act as hereinbefore set forth for the reasons (a) of the prohibition of section 3224 of the Revised Statutes of the United States, and (b) that the plaintiff has an adequate and complete remedy at law.

Wherefore, having fully answered the bill of complaint of the plaintiff, the defendant prays that the motion heretofore made praying for an injunction be denied and that plaintiff's bill of complaint be dismissed.

(Sgd.) PETER H. MILLER,
Collector of Internal Revenue.

(Sgd.) W. P. HUGHES,
United States Attorney.

H. F. MCCONNELL,
Special Attorney,
Bureau of Internal Revenue, Washington, D. C.

[*Duly sworn to by Peter H. Miller; jurat omitted in printing.*]

[File endorsement omitted.]

In United States District Court

[Title omitted.]

Preliminary injunction

Filed Jan. 7, 1930

This cause having heretofore been set for hearing this day, came on to be heard upon the application of plaintiff for a pre-
24 liminary injunction, and was argued by counsel, and the court being fully advised in the premises, and it appearing that the plaintiffs will suffer irreparable injury unless relief be afforded pending final disposition of this cause, it is hereby ordered, adjudged, and decreed as follows, viz:

That the defendant, his agents, assistants, deputies, and employees be enjoined, pending final hearing of this cause, from collecting or attempting to collect, directly or indirectly, from the plaintiff, or any dealer selling plaintiff's product Southern Nut Product, any pretended tax or imposition purporting to be levied or assessed against the plaintiff or said dealers under the oleomargarine act (act of August 2, 1886, chapter 840, 24 Stat. 209, as amended by act of May 9, 1902, chapter 784, sec. 332, Stat. L. 194) on account of the manufacture and sale of the said Southern Nut Product referred to in the petition herein and manufactured by plaintiff; from seizing any of the property of plaintiff herein because an alleged tax of ten cents per pound on the said Southern Nut Product manufactured by plaintiff has not been paid; from distraining, seizing, entering upon, or attaching, or commencing any forfeiture proceedings against the property of plaintiff because an alleged tax of ten cents per pound has not been paid on the said Southern Nut Product manufactured by plaintiff; from enforcing any of the remedies provided for the collection of internal revenue of the United States against plaintiff, its property, officers, agents, or dealers, with respect to said Southern Nut Product; from notifying wholesale or retail dealers in said Southern Nut Product that because of the sale of the said product of plaintiff they will incur liability to a specific tax as dealers in artificially colored oleomargarine; and from making public announcement that the said product manufactured by plaintiff herein is liable to the tax imposed on artificially colored oleomargarine. Provided, this injunction shall not be effective until a good and sufficient Surety Company bond shall be filed herein and approved by the clerk in the penal sum of ten thousand ($10,000) dollars, conditioned to pay all costs and damages occasioned by the wrongful issuance of this injunction, in case said injunction be hereafter dissolved.

Done and ordered at chambers in Jacksonville, Florida, this January 7th, 1930.

LAKE JONES, *Judge.*

[File endorsement omitted.]

In United States District Court

[Title omitted.]

25 *Injunction bond*

Filed Jan. 7, 1930

Know all men by these presents, that we, the Standard Nut Margarine Company, of Florida, a corporation organized and existing under the laws of the State of Florida, as principal, and Hartford Accident & Indemnity Company, of Hartford, Conn., a surety company authorized to do a general surety business in the State of Florida, as surety, are held and firmly bound, jointly and severally, to Peter H. Miller, individually and as collector of internal revenue of the district of Florida, in the penal sum of ten thousand dollars ($10,000.00), for the payment whereof, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Signed and sealed at Jacksonville, Florida, this 7th day of January, A. D. 1930.

The condition of this obligation is such that whereas the United States District Court for the Southern District of Florida in the above-entitled cause granted an injunction on the 7th day of January, A. D. 1930, enjoining the said Peter H. Miller, defendant, as collector of internal revenue of the district of Florida, pending final hearing of said cause from collecting or attempting to collect certain taxes levied and assessed against said the Standard Nut Margarine Company, of Florida, a corporation.

Now, therefore, this indenture further witnesseth that if the above bounden, the Standard Nut Margarine Company, of Florida, a corporation, shall well and truly pay to the said Peter H. Miller, individually and as collector of Internal Revenue for the district of Florida, all costs and damages occasioned by the wrongful issuance of said injunction in case said injunction be hereafter dissolved, then this obligation to be void, else to be and remain in full force and effect.

THE STANDARD NUT MARGARINE COMPANY
OF FLORIDA, A CORPORATION,
By W. T. MELLOTT, *Its President.* [SEAL.]

Attest:

W. E. NICHOLSON, *Its Secretary, Principal.*
HARTFORD ACCIDENT & INDEMNITY COMPANY,
By BURDETTE GARRISON, [SEAL.]
Its Attorney-in-Fact, Surety.

Taken and approved before me this 7th day of January, A. D. 1930.

[SEAL.] CLERK UNITED STATES DISTRICT COURT,
EDWIN R. WILLIAMS, *Clerk.*

[File endorsement omitted.]

26 In United States District Court

[Title omitted.]

Motion for leave to file amended answer

Filed Feb. 17, 1930

Comes now the defendant, Peter H. Miller, individually and as collector of internal revenue for the district of Florida, by his undersigned attorneys, and moves the court for leave to file an amended answer herein, a copy of which proposed amended answer is attached hereto.

W. P. HUGHES,
United States Attorney.
H. F. MCCONNELL,
Special Attorney, Bureau of Internal Revenue, Washington, D. C.
R. F. BROWN,
Special Attorney, Bureau of Internal Revenue, Miami, Florida.

[File endorsement omitted.]

In United States District Court

[Title omitted.]

Stipulation re amended answer

Filed Feb. 18, 1930

It is hereby stipulated and agreed by and between the attorneys for the respective parties to the above-entitled cause that the defendant, Peter H. Miller, individually and as collector of internal revenue for the district of Florida, may file an amended answer in said cause, and it is further stipulated and agreed that said defend-
27 ant may present his motion for leave of court to file said amended answer without further notice, and that an order on the same may be entered immediately.

Dated this 14th day of February, A. D. 1930.

MILAM, MCILVAINE & MILAM,
By E. T. MCILVAINE,
GEORGE N. MURDOCK,
Attorneys for Plaintiff.
W. P. HUGHES,
United States Attorney.
H. F. MCCONNELL,
Special Atty., Bureau of Internal Revenue, Washington, D. C.
R. F. BROWN,
Special Atty., Bureau of Internal Revenue, Miami, Florida.

[File endorsement omitted.]

In United States District Court

[Title omitted.]

Order allowing filing of amended answer

Filed Feb. 18, 1930

This cause coming on this day to be heard upon the motion of the defendant, Peter H. Miller, individually and as collector of internal revenue for the district of Florida, for leave to file an amended answer, and the stipulation of attorneys for the plaintiff and attorneys for the defendant agreeing that an amended answer may be filed in said cause and further agreeing that said defendant may present his motion for leave of court to file said amended answer without further notice, and that an order on the same may be entered immediately, and the court being fully advised in the premises.

It is therefore ordered, adjudged, and decreed that said motion of the defendant herein for leave of court to file an amended answer in said cause be and it is hereby granted.

Done and ordered in chambers at Jacksonville, Florida, this 18th day of February, A. D. 1930.

LAKE JONES,
United States District Judge.

[File endorsement omitted.]

28 In United States District Court

[Title omitted.]

Amended answer

Filed Feb. 18, 1930

The defendant, Peter H. Miller, individually and as collector of internal revenue for the district of Florida, leave of court first having been had, files this, his amended answer to the bill of complaint herein, reserving unto himself the benefit of all necessary objections and exceptions to the errors and insufficiencies of said bill and the jurisdiction of the court, nevertheless answering so much and such parts of the bill as he is advised it is material or necessary for him to answer, that is to say:

1. He admits the allegations of paragraph 1 of plaintiff's bill.
2. He admits the allegations of paragraph 2 of plaintiff's bill.
3. He admits the allegations of paragraph 3 of plaintiff's bill.
4. In answer to paragraph 4 of plaintiff's bill, he denies any knowledge or information sufficient to form a belief as to the averments therein contained and neither admits nor denies the same.
5. Answering paragraph 5 of the bill, defendant admits that plaintiff is engaged in the manufacture and sale of a nut product known

as Southern Nut Product, manufactured and sold under its distinctive name; denies any knowledge or information sufficient to form a belief as to whether said name is in imitation of the distinctive name of any other product or not. He admits that the name is accompanied on the label or brand with the name of the place where it is manufactured and produced; admits that said product contains no added poisonous or deleterious ingredients; admits that said product is a mixture or compound consisting of cocoanut oil, peanut oil, salt, and harmless coloring matter, but denies that the same is manufactured and sold for cooking, baking, and seasoning purposes, and affirmatively alleges that said product is manufactured, sold, and intended to be manufactured and sold in imitation or semblance of butter, and when so made, calculated, and/or intended to be sold as butter or for butter; defendant admits that said Southern Nut Product is packed in one-pound cartons similar to the sample attached to plaintiff's bill, but denies any knowledge or information sufficient to form a belief as to whether that is the only method or manner of packing said product; defendant denies any knowledge or information sufficient to form a belief as to whether plaintiff in the manufacture of said Southern Nut Product buys the materials so used in the said manufacture from a great many persons and firms located
29 outside the State of Florida where the product is manufactured, and sells and ships said product to a great number of firms and persons located in many States of the United States outside of the State of Florida, and, therefore, neither admits nor denies same.

6. Answering paragraph 6 of plaintiff's bill, defendant denies that plaintiff has been engaged in the manufacture of said Southern Nut Product for a period of two years as alleged in said bill, and alleges that the plaintiff has not been engaged in such manufacture for a period of much over a year; defendant admits that plaintiff operates a plant and maintains offices in the city of Jacksonville; denies any knowledge or information sufficient to form a belief as to whether plaintiff had built up a reputation and standing for fair dealing with its customers and other people with whom it has done business.

7. Answering paragraph 7 of plaintiff's bill, defendant admits that prior to engaging in the manufacture and sale of said Southern Nut Product an action at law was brought against one Page, collector of internal revenue for the district of Rhode Island, for the recovery of taxes paid by the Higgins Manufacturing Company on a product known as Nut-Z-All, but as to whether said product was manufactured in the same way and of the same ingredients as Southern Nut Product is manufactured, defendant denies any knowledge or information sufficient to admit or deny the same and therefore neither admits nor denies the same. The defendant admits that the decision in said case is found in volume 297, Federal Reporter, page 644.

8. Answering paragraph 8 of plaintiff's bill, defendant admits that Treasury Decision 3590 was promulgated and published, but as to whether or not all concerned were informed that Nut-Z-All

had been held by the court as not to be oleomargarine, defendant denies any knowledge or information and neither admits nor denies the same.

9. Answering paragraph 9 of plaintiff's bill, defendant admits that in June, 1924, an organization or association of oleomargarine manufacturers known as the Institute of Margarine Manufacturers maintained headquarters in Washington, D. C., and that inquiry was made by said institute to David H. Blair, then Commissioner of Internal Revenue, as to the taxability of said product, Nut-Z-All; defendant admits that a letter set forth in paragraph 9, signed by R. M. Estes, deputy commissioner, was addressed to the Institute of Margarine Manufacturers, dated August 20, 1924.

10. Answering paragraph 10 of plaintiff's bill, defendant admits that Treasury Decision 4006 was promulgated and published, but alleges that said Treasury Decision 4006 was revoked according to law and that the same had been revoked for some considerable period of time before the filing of this action and is no longer in force and effect.

11. He admits the allegations of paragraph 11 of plaintiff's bill.

12. In answer to paragraph 12 of plaintiff's bill, defendant's admits that the Baltimore Butterine Company filed a petition as set forth in said paragraph, but denies any knowledge or information sufficient to form a belief as to whether or not said Southern Nut Product is identical in content and appearance with said products Nu-ine and Nut-Z-All, and therefore neither admits nor denies said allegation.

13. Answering paragraph 13 of plaintiff's bill, defendant denies any knowledge or information sufficient to form a belief as to whether or not plaintiff relies upon said first decision in the Higgins case or Treasury Decision 3590, or the letter signed by R. M. Estes, or said injunction, before commencing to manufacture said product, or whether it began or continued to so manufacture as a result thereof, and can therefore neither admit or deny the same; defendant affirmatively alleges that the plaintiff never submitted its product to the Commissioner of Internal Revenue as required by law, nor to defendant herein to ascertain whether or not this particular product, Southern Nut Product, manufactured by the plaintiff was subject to a tax or as to whether the Commissioner of Internal Revenue had determined the same to be oleomargarine and taxable as such.

14. Answering paragraph 14 of plaintiff's bill, defendant admits that a decision was rendered by Hon. William H. Barrett in the District Court for the Southern District of Georgia, but denies that said case involved the question as to whether said Southern Nut Product was taxable or nontaxable, and the defendant affirmatively alleges that the litigation there involved was not predicated under the act of Congress of August 2, 1886 (24 Stat. 209), as amended by the act of May 9, 1902 (32 Stat. 193), known as the oleomargarine law, nor was a construction of that law involved in said litigation

or the decision rendered therein as set forth in paragraph 14 of plaintiff's bill.

15. Answering paragraph 15 of plaintiff's bill, defendant admits that he received a letter from R. M. Estes, Deputy Commissioner of Internal Revenue, as set forth and contained in said paragraph 15, and denies that he has made any threats to collect a tax of ten cents per pound on said Southern Nut Product, but affirmatively alleges that the plaintiff has at all times herein mentioned and is now voluntarily paying the tax of ten cents per pound upon said product pursuant to and in accordance with the provisions of the Act of August 2, 1886, as amended, as required of all manufacturers of oleomargarine.

16. Answering paragraph 16 of plaintiff's bill, the defendant denies any knowledge or information sufficient to form a belief as to whether the net profit derived in the manufacture and sale of said product is approximately three cents per pound and therefore neither admits or denies the same. He denies that unless plaintiff's petition be granted by this court the levy and collection of ten cents per pound tax upon the nut product already manufactured by plaintiff will render the plaintiff insolvent or subject it to severe penalties or the forfeiture of its factories or plants in which said prod-
31 ucts are made; defendant admits that said demand will render hundreds of wholesalers and retailers who are now handling and selling said products liable for taxes, but denies that it will subject them to severe criminal liability.

17. Answering paragraph 17 of plaintiff's bill, defendant denies that plaintiff has no adequate remedy at law and is without any remedy save in the court of equity or that it is suffering immediate and irreparable loss of property rights, or will continue to so suffer unless the prayer here petitioned for be granted; defendant denies that the demands for taxes and special license fees have completely demoralized the business of plaintiff throughout the territory in which said products have been manufactured, and particularly the territory within the jurisdiction of this court; denies that dealers and agents of plaintiff, fearing severe taxes and penalties, have ceased their purchases of plaintiff's product and have canceled existing orders for same and that they have returned goods on hand and have substituted other products therefor; defendant denies that because of the difference in tax per pound sought to be collected and the net amount of profit upon said product plaintiff is not financially able to pay the tax and sue to recover, and affirmatively alleges that the plaintiff is now and at all times herein mentioned has been paying the tax of ten cents per pound on said product it manufactures and sells, and denies that the imposing of said tax is destroying or will destroy the business of plaintiff; and further denies that unless the relief prayed for herein be granted the good will of plaintiff will be destroyed and its employees forced to seek other employment.

18. Answering paragraph 18 of plaintiff's bill, defendant admits that the plaintiff sells its product to a great many retailers and wholesalers throughout the territory and within the jurisdiction of this court, and denies that unless restrained by this court defendant will subject plaintiff and its dealers to a multiplicity of suits.

19. Answering paragraph 19 of plaintiff's bill, defendant denies that any attempt to make Southern Nut Product taxable as artificially colored oleomargarine will deprive plaintiff of its property without due process of law; defendant denies that the commissioner has made final decision that said Southern Nut Product or similar products are not taxable as artificially colored oleomargarine.

20. Defendant admits paragraph 20 of plaintiff's bill.

21. Defendant admits paragraph 21 of plaintiff's bill.

22. Answering paragraph 22 of plaintiff's bill, defendant admits that plaintiff's products are composed of vegetable oil, salt, water, and harmless coloring matter, and that there is no element of an animal nature therein contained, but as to whether or not said products are the same as Nut-Z-All and Nu-ine, the defendant denies any knowledge or information sufficient to form a belief, and, therefore, can neither admit nor deny the same; and as to the re-
32 maining allegations as set forth in said paragraph, the defendant alleges the same are the conclusions of the pleader and call for no answer.

23. Answering paragraph 23 of plaintiff's bill, defendant denies the same.

24. Answering paragraph 24 of plaintiff's bill, defendant denies the same.

25. Answering paragraph 25 of plaintiff's bill, defendant denies the same.

26. Answering paragraph 26 of plaintiff's bill, defendant denies the same.

27. Answering paragraph 27 of plaintiff's bill, defendant denies the same.

28. Answering paragraph 28 of plaintiff's bill, defendant denies the same.

29. Answering paragraph 29 of plaintiff's bill, defendant denies the same.

The defendant, further answering plaintiff's bill of complaint, affirmatively alleges that said taxes, having been duly assessed and sold by plaintiff, is artificially colored oleomargarine, and is taxable pursuant to and in accordance with the provisions of the act of August 2, 1886, as amended.

Further answering plaintiff's bill of complaint, the defendant affirmatively alleges that said taxes, having been duly assessed against said products according to law, and said products being oleomargarine within the provisions of the act of August 2, 1886, as amended, and said products having been determined by the Commissioner of Internal Revenue to be taxable as oleomargarine, the de-

fendant is advised by counsel and therefore alleges that this court of equity is without jurisdiction to restrain the collection of said taxes duly assessed pursuant to and in accordance with said act, as hereinbefore set forth for the reason—

(a) Of the prohibition of section 3224 of the Revised Statutes of the United States; and

(b) That the plaintiff has an adequate and complete remedy at law.

Wherefore, having fully answered the bill of complaint, the defendant prays that the motion heretofore made praying for an injunction be denied and that plaintiff's bill of complaint be dismissed.

PETER H. MILLER,
Collector of Internal Revenue.

W. P. HUGHES,
United States Attorney.
H. F. MCCONNELL,
Special Attorney, Bureau of Internal Revenue,
Washington, D. C.
R. F. BROWN,
Special Attorney, Bureau of Internal Revenue,
Miami, Florida.

33 [*Duly sworn to by Peter H. Miller; jurat omitted in printing.*]

[File endorsement omitted.]

In United States District Court for the Southern District of Florida, Jacksonville Division

In Equity, No. 651

THE STANDARD NUT MARGARINE COMPANY OF FLORIDA, A CORPORATION, plaintiff

vs.

PETER H. MILLER, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE for the District of Florida, defendant

Final decree

Filed Mar. 4, 1930

This cause having come on for final hearing, and court having heard the evidence, and being fully advised of its judgment in the premises; it is ordered, adjudged, and decreed as follows:

1. The equities of this cause are with the complainant and against the defendant, and complainant is entitled to the relief prayed in the bill of complaint.

2. The court finds that the complainant has established the material allegations of the bill of complaint.

3. It is ordered that the temporary injunction granted in this cause under date January 7th, A. D. 1930, be, and the same is hereby, made permanent, and that said defendant, Peter H. Miller, as collector of internal revenue for the district of Florida, be, and he is hereby, permanently restrained and enjoined as in said temporary injunction said defendant was heretofore enjoined.

34 Done and ordered at chambers at Jacksonville, Florida, this March 4th, A. D. 1930.

LAKE JONES, *District Judge.*

[File endorsement omitted.]

In United States District Court

[Title omitted.]

Notice of appeal

To the Standard Nut Margarine Company of Florida, a Corporation, Jacksonville, Florida, Greeting:

You are hereby notified that Peter H. Miller, individually and as collector of internal revenue for the district of Florida, the defendant in the above-enti'led cause, appellant herein, hereby appeals to the United States Circuit Court of Appeals for the Fifth Circuit from that certain final decree entered in the above-styled cause on the 4th day of March, A. D. 1930, and from each and every part thereof.

And you are further hereby notified that said defendant, appellant herein, has filed his assignment of errors in said cause in accordance with law, staying further proceedings in said cause pending the final judgment on appeal in said cause.

(Filed April 15, 1930, Jacksonville. Edwin R. Williams, clerk.)

W. P. HUGHES,
United States Attorney,
H. F. MCCONNELL,
Special Attorney, Bureau of Internal Revenue, Washington, D. C.,
RAYMOND F. BROWN,
Special Attorney, Bureau of Internal Revenue, Miami, Florida,
Attorneys for Peter H. Miller, Individually and as Collector of Internal Revenue for the District of Florida, Defendant and Plaintiff in Error.

35 In United States District Court

[Title omitted.]

Petition for appeal

Filed April 15, 1930

To the honorable Judges of the United States District Court for the Southern District of Florida:

Comes now Peter H. Miller, individually and as collector of internal revenue for the district of Florida, defendant herein, by his undersigned attorneys, and respectfully represents to the court as follows:

That petitioner is aggrieved by the final decree rendered in the above-entitled cause on the 4th day of March, 1930, in favor of plaintiff and against the defendant in said cause, and that petitioner for the reasons specified in the assignment of errors filed herein desires to appeal from the said final decree and desires that said appeal returnable to the United States Circuit Court of Appeals for the Fifth Circuit, may suspend during the pendency of said appeal the effect of said final decree.

Wherefore petitioner prays that the said appeal may be allowed and that the said appeal may suspend during the pendency of said appeal the effect of said final decree; that said appeal be made returnable to the United States Circuit Court of Appeals for the Fifth Circuit, according to law, and that a transcript of the records and proceedings and papers and exhibits, upon which said final judgment was rendered, duly authenticated, be sent to said Circuit Court of Appeals, and, together with this petition, the petitioner presents his assignment of errors and prayer for reversal.

W. P. HUGHES,
United States Attorney,

H. F. MCCONNELL,
Special Attorney, Bureau of Internal Revenue,
Washington, D. C.,

RAYMOND F. BROWN,
Special Attorney, Bureau of Internal Revenue,
Miami, Florida,
Attorneys for Peter H. Miller, Individually and as Collector of Internal Revenue for the District of Florida,
Defendant and Plaintiff in Error.

[File endorsement omitted.]

36 In United States District Court

[Title omitted.]

Assignment of errors

Filed April 15, 1930

And now comes Peter H. Miller, individually and as collector of internal revenue for the district of Florida, by his attorneys, and in connection with his petition for appeal, says that in the record, proceedings, and in the final decree aforesaid, manifest error has intervened to the prejudice of said Peter H. Miller, individually and as collector of internal revenue for the district of Florida, plaintiff in error, to wit:

1. The final decree is contrary to the evidence.
2. The final decree is contrary to law.
3. The court erred in denying the defendant's motion that the preliminary injunction issued in this cause be vacated, annulled, and set aside and the cause dismissed.
4. The court erred in signing and entering the final decree in this cause and each and every part thereof.
5. For other errors apparent on the record.

By reason whereof plaintiff in error prays that the decree aforesaid may be reversed.

W. P. HUGHES,
United States Attorney,
H. F. MCCONNELL,
Special Attorney, Bureau of Internal Revenue,
Washington, D. C.,
RAYMOND F. BROWN,
Special Attorney, Bureau of Internal Revenue,
Miami, Fla.,
Attorneys for Peter H. Miller, Individually and as Collector of Internal Revenue for the District of Florida,
Plaintiff in Error.

[File endorsement omitted.]

37 In United States District Court

[Title omitted.]

Prayer for reversal

Filed April 15, 1930

To the honorable the Judges of the United State Circuit Court of Appeals of the Fifth Circuit:

Comes now Peter H. Miller, individually and as collector of internal revenue for the district of Florida, plaintiff in error, and prays for a reversal of the final decree specified in his assignment

of error filed herewith, made and entered in the District Court of the United States in and for the Southern District of Florida, in that certain action brought by the Standard Nut Margarine Company of Florida, a corporation, defendant in error named above, against Peter H. Miller, individually and as collector of internal revenue for the district of Florida, plaintiff in error named above.

W. P. HUGHES,
United States Attorney,
H. F. MCCONNELL,
Special Attorney, Bureau of Internal Revenue,
Washington, D. C.,
RAYMOND F. BROWN,
Special Attorney, Bureau of Internal Revenue,
Miami, Fla.,
Attorneys for Peter H. Miller, Individually and as Collector of Internal Revenue for the District of Florida,
Plaintiff in Error.

[File endorsement omitted.]

In United States District Court

In Equity, No. 651 J–Eq.

THE STANDARD NUT MARGARINE COMPANY OF FLORIDA, A CORPORATION, plaintiff

vs.

PETER H. MILLER, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE for the District of Florida, defendant

Order allowing appeal

Filed April 15, 1930

On this 15 day of April, A. D. 1930, came Peter H. Miller, individually and as collector of internal revenue for the district
38 of Florida, defendant in the above-styled cause, by his attorneys, and presented and filed herein his petition for appeal and simultaneously presented and filed with the said petition his assignment of errors intended to be relied upon by him and his prayer for reversal:

Upon consideration whereof, it is ordered that the appeal be, and the same is hereby, granted and allowed to Peter H. Miller, individually and as collector of internal revenue for the district of Florida, petitioner herein and defendant in this suit, from the final decree of March 4, 1930, rendered against the defendant in said cause, and that the said appeal shall suspend during the pendency of said appeal the effect of said final decree, and that said appeal shall be returnable to the United States Circuit Court of Appeals for the

Fifth Circuit, according to law, and that a transcript of records and proceedings and papers and exhibits upon which said final decree was rendered, duly authenticated, shall be filed in the United States Circuit Court of Appeals, according to law, as prayed for by Peter H. Miller, individually and as collector of internal revenue for the district of Florida.

LAKE JONES,
United States District Judge.

[File endorsement omitted.]

In United States District Court

[Title omitted.]

Præcipe for record

Filed April 25, 1930, and refiled Sept. 18, 1930

The clerk of the above-styled court is hereby requested and directed to prepare and certify a transcript of the record in the above-styled cause, for the use of the United States Circuit Court of Appeals for the Fifth Circuit, by including therein the following papers:

1. Bill of complaint.
2. Chancery subpœna.
3. Answer of defendant.
4. Preliminary injunction.
5. Injunction bond.

39 6. Motion of defendant for leave to file amended answer.

7. Stipulation as to filing of amended answer.
8. Order allowing filing of amended answer.
9. Amended answer of defendant.
10. Final decree in favor of complainant and making temporary injunction permanent.

(Sgd.) WILBURN P. HUGHES,
United States Attorney,

(Sgd.) H. F. MCCONNELL,
Special Attorney, Bureau of Internal Revenue, Washington, D. C.,

(Sgd.) RAYMOND F. BROWN,
Special Attorney, Bureau of Internal Revenue, Miami, Florida,
Attorneys for Peter H. Miller, Individually and as Collector of Internal Revenue for the District of Florida, Defendant and Plaintiff in Error.

(Indorsed on back as follows:)

Received this writ at Jacksonville, Florida, September 18, 1930, and executed it at Jacksonville, Florida, the same day, by exhibiting this original writ and delivering a true copy hereof to W. E. Nichol-

son, secretary-treasurer of the Standard Nut Margarine Company, of Florida, a corporation, making known to him the nature of same.

Fees: $2.00.

C. N. HILDRETH, Jr.,
U. S. Marshal,
By (Signed) FRANK A. KOPP, *Deputy.*

Further executed this writ at Jacksonville, Florida, September 18, 1930, by exhibiting this original writ and delivering a true copy hereof to E. T. McIlvaine, of the firm of Milam, McIlvaine & Milam, solicitors for the Standard Nut Margarine Company, of Florida, a corporation.

Fees: $2.00.

C. N. HILDRETH, Jr.,
U. S. Marshal,
By (Signed) W. W. WARD, Jr., *Deputy.*

1844—28—86. Received by U. S. Marshal, So. Dist. of Fla., Sept. 18, 1930, Jacksonville.

[File endorsement omitted.]

40 In United States District Court

[Title omitted.]

Amended præcipe for record

Filed June 11, 1930, and refiled Sept. 18, 1930

The clerk of the above-styled court is hereby requested and directed to prepare and certify a transcript of the record in the above-styled cause, for the use of the United States Circuit Court of Appeals for the Fifth Circuit, by including therein the following papers:

1. Bill of complaint.
2. Chancery subpœna.
3. Answer of defendant.
4. Preliminary injunction.
5. Injunction bond.
6. Motion of defendant for leave to file amended answer.
7. Stipulation as to filing of amended answer.
8. Order allowing filing of amended answer.
9. Amended answer of defendant.
10. Final decree in favor of complainant and making temporary injunction permanent.
11. Notice of appeal.
12. Petition for appeal.
13. Assignment of errors.
14. Prayer for reversal.
15. Order allowing appeal.

16. Præcipe for record.
17. Amended præcipe for record.

(Sgd.) WILBURN P. HUGHES,
United States Attorney,

(Sgd.) H. F. MCCONNELL,
Special Attorney, Bureau of Internal Revenue, Washington, D. C.,

(Sgd.) RAYMOND F. BROWN,
Attorney, Bureau of Internal Revenue, Miami, Florida,
Attorneys for Peter H. Miller, Individually and as Collector of Internal Revenue for the District of Florida, Defendant and Plaintiff in Error.

Received this writ at Jacksonville, Florida, September 18, 1930, and executed it at Jacksonville, Florida, the same day, by exhibiting this original writ and delivering a true copy hereof to W. E.
41 Nicholson, secretary-treasurer of the Standard Nut Margarine Company, of Florida, a corporation, making known to him the nature of same.

Fees: $2.00.

C. N. HILDRETH, Jr.,
U. S. Marshal,
By (Signed) FRANK A. KOPP, *Deputy.*

Further executed this writ at Jacksonville, Florida, September 18, 1930, by exhibiting this original writ and delivering a true copy hereof to E. T. McIlvaine, of the firm of Milam, McIlvaine & Milam, solicitors for the Standard Nut Margarine Company, of Florida, a corporation.

Fees: $2.00.

C. N. HILDRETH, Jr.,
U. S. Marshal,
By (Signed) W. W. WARD, Jr., *Deputy.*

1841—28—86. Received by U. S. marshal, So. Dist. of Fla., Sept. 18, 1930, Jacksonville.

[File endorsement omitted.]

In United States District Court

[Title omitted.]

Motion for order allowing withdrawal of citation, etc.

Filed Sept. 4, 1930

To the honorable Judges of the United States District Court for the Southern District of Florida:

Comes now Peter H. Miller, individually and as collector of internal revenue for the district of Florida, defendant herein, by his

undersigned attorneys, and respectfully represents to the court as follows:

That through inadvertence the citation heretofore signed on the 15th day of April, A. D. 1930, by the honorable Lake Jones, judge of the United States District Court for the Southern District of Florida, now deceased, in the appeal of this petitioner, defendant in the above-styled cause, to the United States Circuit Court of Appeals for the Fifth Circuit from the final decree rendered
42 in the above-entitled cause on the 4th day of March, A. D. 1930, in favor of plaintiff and against the defendant in said cause, was filed in the office of the clerk of the United States District Court for the Southern District of Florida at Jacksonville, Florida, without first being served upon the above-styled plaintiff.

Wherefore petitioner, by his undersigned attorneys, respectfully moves the court for an order allowing the withdrawal of the citation from the office of the clerk of the United States District Court for the Southern District of Florida at Jacksonville, Florida, for the purpose of the service of said citation upon the Standard Nut Margarine Company of Florida, a corporation, the plaintiff in the above-entitled cause, and the refiling of the said citation after said service of the same.

(Sgd.) WILBURN P. HUGHES,
United States Attorney,

(Sgd.) H. F. MCCONNELL,
Special Attorney, Bureau of Internal Revenue, Washington, D. C.,

(Sgd.) RAYMOND F. BROWN,
Special Attorney, Bureau of Internal Revenue, Miami, Florida,

Attorneys for Peter H. Miller, Individually and as Collector of Internal Revenue for the District of Florida, Defendant and Plaintiff in Error.

[File endorsement omitted.]

In United States District Court

[Title omitted.]

Order allowing withdrawal of citation, etc.

Filed Sept. 4, 1930

This cause coming on this day to be heard upon the motion of Peter H. Miller, individually and as collector of internal revenue for the district of Florida, defendant in the above-styled cause, by his attorneys, for an order allowing the withdrawal from the office of the clerk of the United States District Court for the Southern District of Florida at Jacksonville, Florida, of the citation heretofore filed in said office as set forth in said motion for the purpose

of the service of said citation upon the above-styled plaintiff and the refiling of the said citation in said clerk's office after such service has been made, and the matter having been submitted, and the court being fully advised, it is upon consideration ordered and adjudged—

1. That the citation be released by the clerk of the United States District Court for the Southern District of Florida at Jacksonville, Florida, to counsel for Peter H. Miller, individually and as collector of internal revenue for the district of Florida, for service upon the Standard Nut Margarine Company, of Florida, a corporation.

2. That said citation be refiled in said clerk's office after such service has been made as aforesaid.

Done and ordered at Tampa this 4th day of September, A. D. 1930.

(Sgd.) ALEXANDER ACKERMAN,
United States District Judge.

[File endorsement omitted.]

In United States District Court

[Title omitted.]

Motion for order allowing withdrawal of præcipe

Filed Sept. 18, 1930

To the honorable Judges of the United States District Court for the Southern District of Florida:

Comes now Peter H. Miller, individually and as collector of internal revenue for the district of Florida, defendant herein, by his undersigned attorneys, and respectfully represents to the court as follows:

That through inadvertence the præcipe for record, filed April 25, 1930, and the amended præcipe for record, filed June 11, 1930, in the appeal of this petitioner, defendant in the above-styled cause, to the United States Circuit Court of Appeals for the Fifth Circuit from the final decree rendered in the above-entitled cause on the 4th day of March, A. D. 1930, in favor of the plaintiff and against the defendant in said cause, were filed in the office of the clerk of the United States District Court for the Southern District of Florida at Jacksonville, Florida, without first being served upon the above-styled plaintiff.

Wherefore petitioner, by his undersigned attorneys, respectfully moves the court for an order allowing the withdrawal of the præcipe for record and the amended præcipe for record from the office of the clerk of the United States District Court for the Southern District of Florida, at Jacksonville, Florida, for the purpose of the service of said præcipe for record and amended præcipe for record upon the Standard Nut Margarine Company of Florida, a corporation, the plaintiff in the above-entitled cause, and

the refiling of the said præcipe for record and amended præcipe for record after said service of the same.

WILBURN P. HUGHES,
United States Attorney,
H. F. MCCONNELL,
Special Attorney, Bureau of Internal Revenue,
Washington, D. C.,
RAYMOND F. BROWN,
Special Attorney, Bureau of Internal Revenue,
Miami, Florida,
Attorneys for Peter H. Miller, Individually and as Collector of Internal Revenue for the District of Florida,
Defendant and Plaintiff in Error.

[File endorsement omitted.]

In United States District Court

[Title omitted.]

Order allowing withdrawal of præcipe, etc.

Filed Sept. 18, 1930.

This cause coming on this day to be heard upon the motion of Peter H. Miller, individually and as collector of internal revenue for the district of Florida, defendant in the above-styled cause, by his attorneys, for an order allowing the withdrawal from the office of the clerk of the United States District Court for the Southern District of Florida, at Jacksonville, Florida, of the præcipe for record and amended præcipe for record heretofore filed in said office as set forth in said motion, for the purpose of the service of said præcipe for record and amended præcipe for record upon the above-styled plaintiff and the refiling of the said præcipe for record and amended præcipe for record in said clerk's office after such service has been made, and the matter having been submitted, and the Court being fully advised, it is upon consideration ordered and adjudged—

45 1. That the præcipe for record and amended præcipe for record be released by the clerk of the United States District Court for the Southern District of Florida, at Jacksonville, Florida, to counsel for Peter H. Miller, individually and as collector of internal revenue for the district of Florida, for service upon the Standard Nut Margarine Company of Florida, a corporation.

2. That said præcipe for record and amended præcipe for record be refiled in said clerk's office after such service has been made as aforesaid.

Done and ordered at Tampa this 15th day of September, A. D. 1930.

(Sgd.) ALEXANDER AKERMAN,
United States District Judge.

[File endorsement omitted.]

In United States District Court, Southern District of Florida

No. 651–J, Equity

THE STANDARD NUT MARGARINE COMPANY OF FLORIDA, A CORPORATION, plaintiff

vs.

PETER H. MILLER, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE for the District of Florida, defendant

Statement of evidence

Filed Sept. 30, 1930

The above-entitled cause came on for trial at 10.00 o'clock a. m. at Jacksonville, Florida, on Monday, March 3rd, A. D. 1930, before the Honorable Lake Jones.

Appearances: George N. Murdock, Esquire, and E. T. McIlvaine, Esquire, of the firm of Milam, McIlvaine and Milam, solicitors for the plaintiff, and Harrison F. McConnell, Esquire, and Raymond F. Brown, Esquire, solicitors for the defendant.

Whereupon Mr. George N. Murdock made his opening statement of the case to the court.

Motion to dismiss

Whereupon Mr. McConnell made the following motion:

"At this time the defendant moves the court that the preliminary injunction heretofore issued in said cause be vacated, annulled, and set aside, and the cause be dismissed upon the grounds and for the following reasons:

"1. The bill filed herein does not state facts sufficient to entitle plaintiff to any relief, there being no equity stated therein.

"2. The court is without jurisdiction of the cause by reason of the fact there is a defect in the parties appearing upon the face of the bill, in that the United States of America is a necessary
46 and indispensable party to said cause, and not having consented to be sued, and not being a party to said cause, the court is without jurisdiction to proceed.

"3. The court is without jurisdiction to restrain the collection of the tax in question, the bill disclosing that an assessment has been made by the Commissioner of Internal Revenue according to law; that by reason of the provisions of section 3224 of the Revised Statutes of the United States this action is prohibited, and the court has no jurisdiction to restrain the collection of the tax.

"4. The Commissioner of Internal Revenue having determined said product, Southern Nut Product, to be taxable pursuant to and in accordance with the provisions of the act of 1886, as amended, as

disclosed by the bill and that authority, and the authority being invested in him to determine said products pursuant to and in accordance with the provisions of section 14 of the act, the court has no jurisdiction to review the acts of the said commissioner as to the taxability of the said product.

"5. That the bill seeks to enjoin future assessment of taxes, and by reason thereof this court has no jurisdiction to entertain said cause.

"6. Said action seeks to refrain the Commisisoner of Internal Revenue, not a party to this action, from assessing or attempting to assess future taxes against said parties, and by reason of the fact said commissioner is not made a party to said action and can not be made a party to said action by reason of not being within the jurisdiction, said court has no jurisdiction to proceed in said cause."

Whereupon the court stated that motion will be ruled on at the completion of the argument.

Whereupon the remainder of the day was taken up in argument by counsel for the respective parties.

Whereupon court adjourned until 10.00 o'clock a. m., March 4th, 1930, and at 10.00 o'clock a. m., March 4th, 1930, the court reconvened, same parties present as before, and the following further proceedings were had:

Colloquy between court and counsel

By the COURT. Gentlemen, the court has given careful consideration to the arguments presented yesterday on the law of this case. The court has reached this conclusion: I am of the opinion that this case presents a condition within the meaning of Hill versus Wallace. There are a number of elements that make that law applicable, I think. In the first place, I think the purpose of this act of 1886 was not so much the purpose of raising revenue by the Government as it was to regulate the handling of these oleomargarine products.

Within the last fifteen or twenty years we have gone a long way toward a highly centralized government in this country; we run to the Federal Government for almost any kind of things these days. Congress, in order to have jurisdiction within itself, granted powers of the Federal Government as to bring it within one of the grants given to the Federal Government by the Constitution. One of the ways of doing that is making it a revenue act and imposing a
47 tax. That was done in the child labor law; that was done in the Harrison narcotic law. I am not criticising Congress for that, because I realize that this country has gotten so extensive the States are unable to cope with questions and conditions, and we are bound to appeal to the Federal Government. Take, for instance, this fruit-fly situation in this State; it would be physically and financially impossible for the State of Florida to cope with those kind of things.

Now, this bill alleges, and the defendant has admitted in the answer, that the court of Rhode Island has decided that this product, or a similar product as this, is not taxable under this law. The Government undertook, notwithstanding that adjudication of that court, to enforce collection of this tax in that district, and the court did not hesitate to issue an injunction restraining it. The Government comes down here, then, after it has declared itself, and while that might not have the binding force of law—of course this product could not be taxed after that decision; that is quite persuasive to me. I have a great deal of confidence in the officers of the Government who are given discretionary powers, and when they come to a decision they ought to stick to it; but instead of that they come down here and undertake to tax this product regardless of that finding, and in addition to the finding of that court up there, while the issues in the Georgia case were not the same, nevertheless Judge Barrett has unquestionably decided, and the Circuit Court of Appeals of this circuit affirmed, that this product is not made or manufactured in the semblance of butter. If somebody buys that product, fully advised what it is, and wants to use *as* it as butter, that is not fraud on the part of, or the fault of, the manufacturer. You take a great many people to-day use vegetable oils for cooking in the place of lard; people use olive oil; you can go to the store and buy cottonseed oil and know what it is, and you want to use it like you use lard; nobody is misrepresented by that. It is your own doing.

Now, of course, to bring this case outside of section 3224 there must be some extraordinary and unusual conditions. The conditions that I refer to exist, according to this bill, and that is admitted by the answer; but in addition to that an irreparable injury will be done to this plaintiff, under the allegations of the bill, in this way, that he must not only pay this tax, but he must lose and will lose unquestionably a great many of his customers and dealers, both wholesale and retail, because I can readily understand that a wholesale merchant or a retail merchant does not want to take the chance of being inflicted with a very heavy penalty, when not only the nature of the tax or license that he has to pay, but the penalty he will be subjected to if he does not. That brings a reparable injury to this plaintiff, if it is not prevented. In addition to that this action would prevent a multiplicity of suits. How are these people going to get their money back if it is held this property is not within—every one of them, the bill says thousands of people who sell this product, every one of them would have to bring a suit or file a claim and have litigation
48 growing out of that condition, and I say for that reason I am quite sure in my opinion—that this case comes within the exception.

Now, there is only one question about the facts. It is submitted that this product is similar in its constituent parts to the Higgins products, the products that were passed on in the court in Rhode Island; but the answer denies it is the same or similar. How, I do

not know whether it means you mix it differently or not; the Government denies that, and I think that is an important element in this case for this court to pass on. Therefore I do not feel the court is in position to enter a decree solely on this law. In other words, I think the defendant should take this testimony, at least along that line, because there is a controversy over that, and let the court determine then from the facts whether or not it is the same.

You may proceed with the testimony.

By Mr. McConnell. May it please the court, do I understand at this time the motion for final decree is being denied? There are two motions before the court, one was for the entry of final decree and a motion by the defendant for dismissal on the ground of jurisdiction. Those two motions are before the court. For the purpose of the record, do I understand the court is now going to deny that motion for final decree under the law?

By the Court. No; the court has passed on the law, and wants to hear the testimony. I will pass on the question of final decree later.

By Mr. McConnell. I understand you are not passing on either of the motions at this time.

By the Court. No.

By Mr. McConnell. For the purpose of the record, I would like the record to show that at this time the defendant requests a ruling on the two motions now before the court, before testimony is put in as to the facts, just for the purpose of the record.

By the Court. The court will rule on that motion. It will be denied.

By Mr. McConnell. And of course in denying ours, we take exception. The defendant excepts to the denial of the motion made by the defendant.

By Mr. McIlvaine. Counsel is in error when he said we moved for a final decree.

By the Court. I understand that. There was no occasion to make a motion of that kind while the court was hearing this argument on the law.

By Mr. McConnell. That was the express purpose I had in asking if that went into the record, if that was a motion being made for the entry of final decree at that time.

By the Court. I told you that that would be made, not at that time, but at the proper time. I do not think that was the proper time for making it.

By Mr. McConnell. I would like an exception to that.

By the Court. You can take exception to that also.

49 By Mr. McConnell. I take exception to that also.

(Whereupon the witness herein after referred to testified in substance on behalf of the plaintiff in accordance with the following condensed narrative statement of the evidence, save when a proper understanding of the questions presented required parts of the testimony to be set forth otherwise.)

Testimony of Mr. W. E. NICHOLSON.

Direction examination by Mr. MURDOCK:

My name is W. E. Nicholson, and I live in Jacksonville, Florida. I am secretary, treasurer, and manager of the Standard Nut Margarine Company, of Florida.

By Mr. MCCONNELL. Just at this time, we object to the introduction of any testimony upon the ground and for the reason, and I ask at this time that the grounds of the motion be incorporated in this objection.

By the COURT. Very well.

By Mr. MCCONNELL. Upon the grounds:

1. The bill filed herein does not state facts sufficient to entitle plaintiff to any relief, there being no equity stated therein.

2. The court is without jurisdiction of the case by reason of the fact there is a defect in the parties appearing upon the face of the bill, in that the United States of America is a necessary and indispensable party to said cause, and not having consented to be sued, and not being a party to said cause, the court is without jurisdiction to proceed.

3. The court is without jurisdiction to restrain the collection of the tax in question, the bill disclosing that an assessment has been made by the Commissioner of Internal Revenue, according to law; that by reason of the provisions of section 3224, Revised Statute of the United States, this action is prohibited, and the court has no jurisdiction to restrain the collection of the tax.

4. The Commissioner of Internal Revenue having determined said product, Southern Nut Product, to be taxable pursuant to and in accordance with the provisions of the act of 1886, as amended, as disclosed by the bill, and that authority, and the authority being invested in him to determine the said products pursuant to and in accordance with the provisions of section 14 of the act, the court has no jurisdiction to review the acts of the said commissioner as to the taxability of said product.

5. That the bill seeks to enjoin future assessment of taxes, and, by reason thereof, this court has no jurisdiction to entertain said cause.

6. The said action seeks to restrain the Commissioner of Internal Revenue, not a party to this action, from assessing or attempting to assess future taxes against said parties, and by reason of the fact said commissioner is not made a party to said action and can not be made a party to said action by reason of not being within
50 the jurisdiction, said court has no jurisdiction to proceed in said cause.

By the COURT. Objection overruled; exception noted for the defendant.

(Whereupon Mr. Nicholson further testified as follows:)

The nature of the business of the Standard Nut Margarine Company of Florida is the manufacture and sale of nut margarine and nut products. This corporation has been in business in Jacksonville

since 1924. The corporation has been manufacturing and selling the product known as Southern Nut Product since April, 1928. At the time the corporation began the manufacture of Southern Nut Product I had a conversation with a representative of the defendant in this case at his office in Jacksonville relative to the manufacture and sale of that product in this collection district. I visited the office of the collector and talked to Mr. Ball, who was the deputy in charge of the oleomargarine division at this office here some time in March, 1928. Previous to that time Mr. Ball and I had discussed the nut products situation, several nut products were being sold upon our market, taxed free, and we were at that time producing only nut margarine, or nut margarine was taxable by us at ten cents a pound; retail dealers were paying a license of forty-eight dollars a year and wholesale dealers were paying four hundred and eighty dollars a year. I explained to the deputy that we had reached the conclusion after considerable deliberation that we must either manufacture a product of this same kind in order to protect our business against these products which had been declared not taxable, or go out of business, and I asked the deputy to write a letter to the Commissioner of Internal Revenue at Washington stating our case, and ask him for all the rules and regulations pertaining to products of this kind, and also asked him if we might manufacture a product of this kind in our bonded oleomargarine factory. You understand we are bonded as manufacturers to the Government, under license; the premises are designated to the Government, and I wanted a ruling as to whether if we could manufacture such a product, could we manufacture it on these bonded premises. I was advised some days later by the office of the collector that they had received a letter from the commissioner, and was furnished with a certified copy of that letter.

By Mr. MURDOCK. I show you document marked for the purpose of identification "Plaintiff's Exhibit 1," and ask you if that is the copy of the letter which was given to you by the defendant in this case?

By Mr. MCCONNELL. To which the defendant objects upon the grounds and for the reason that it is incompetent.

By the COURT. You better find out if that is a copy or not. You object to it on the ground it is not a copy?

By Mr. MCCONNELL. It purports to be a copy of a communication between the Commissioner of Internal Revenue and the de-
51 fendant. We object upon the ground that it is incompetent, irrelevant, and immaterial so far as any issue in this case is concerned.

By the COURT. Objection overruled; exception noted for the defendant.

By Mr. MURDOCK. Yes or no.

By Mr. NICHOLSON. Yes; that is a copy of the letter.

By Mr. MURDOCK. I offer in evidence plaintiff's Exhibit No. 1.

By the COURT. Is that letter set out in the bill?

By Mr. MURDOCK. It is.

By Mr. NICHOLSON. That is the letter, a part of which is set out in the bill, signed by Commissioner Estes.

By the COURT. Signed by Estes?

By Mr. NICHOLSON. Signed by Commissioner Estes.

By Mr. MCCONNELL. That letter is not set out in the bill, may it please the court.

By Mr. MURDOCK. Part of it, I said.

By Mr. MCCONNELL. In paragraph 13, if the court please, there are certain sentences in this letter which are in this letter, and which are set out in the petition. It does not purport to set out this letter in the bill. There is no date; it is not addressed to anyone, or signed by anyone; no reference to this letter whatsoever.

By Mr. MURDOCK. I simply alleged in the bill a letter was received, and it is the entire letter which I would now like to put in evidence.

By the COURT. What is the materiality of that?

By Mr. MURDOCK. This is the letter upon which the plaintiff relied in the manufacture of its product as being permitted by the revenue department to proceed to manufacture tax free.

By Mr. MCCONNELL. For the purpose of the record, we object to the introduction of plaintiff's Exhibit One upon the ground and for the reason it is incompetent and irrelevant to any issue in the case. The letter is not described or pleaded in the bill. The letter purports to be a communication from the Commissioner of Internal Revenue, not a party to this action, addressed to the collector of internal revenue at Jacksonville.

By the COURT. Objection overruled; exception noted for the defendant.

(Whereupon said letter was filed in evidence and marked "Plaintiff's Exhibit No. 1."

Whereupon Mr. Nicholson further testified as follows:)

I have just mentioned certain products which were being sold on our market tax free. At that time the principal products that had appeared upon our market were the products that we mentioned so much, Higgins Nut Products. Another one by them was known as Nut-Z-All. Another one of theirs known as Penobscot, also one known as Nuine, manufactured by the Baltimore Butterine Company.

52 (A package marked for identification "Plaintiff's Exhibit 2" was shown to the witness and he was asked to explain to the court what it was and whether it was one of the products to which he referred.)

By Mr. NICHOLSON. This product is Higgins Nut Product, and this was the first nut product that I ever saw on the market. It was here as early as 1925, and it is still being sold upon the market in Florida.

By Mr. MCCONNELL. To which we object, if the court please, on the ground it is immaterial, irrelevant, and incompetent so far as any of the issues here are concerned.

By the COURT. Objection overruled; exception noted for the defendant.

(Whereupon Mr. Nicholson further testified as follows:)

This product is a mixture or compound of cocoanut oil, peanut oil, salt, water, and coloring matter. That is stated on the wrapper.

By Mr. MCCONNELL. If the court please, we further object to the introduction of this testimony because there is no proper foundation laid; this witness has not qualified as an expert, nor is he qualified to show any knowledge of the contents of these products.

By the COURT. He has read from the label on the package.

By Mr. MCCONNELL. He is testifying as an expert as to what these products are.

By the COURT. Do you know what this is, Mr. Nicholson?

By Mr. NICHOLSON. I do.

By the COURT. How do you know it?

By Mr. NICHOLSON. I saw it. It says what it is on the label, and I have been familiar with this product.

By the COURT. Did you ever analyze it? Do you know of your own knowledge what this contains here?

By Mr. NICHOLSON. I have not analyzed it.

By the COURT. You couldn't know?

By Mr. NICHOLSON. I can only take their statement.

By the COURT. The objection is sustained; exception noted for the plaintiff.

By Mr. MCCONNELL. I move to strike all that testimony he has given with regard to the Higgins Nut Product.

By the COURT. That motion will be denied; exception noted for the defendant.

(Whereupon Mr. Nicholson further testified as follows:)

The label on this product says, "In making Higgins Nut Product, the following formula is used in accord with the decision of the Federal court," we quote verbatim, and then is the quotation: "In making one hundred pounds of Higgins Nut Product are used eighty pounds of cocoanut oil, twenty pounds of peanut oil, three pounds of salt, one-tenth of one per cent coloring," and it goes on to say, "a duplication of this formula is forbidden except by license from Higgins Manufacturing Company, Providence, Rhode Island." Now, when we began the manufacture of Southern Nut Product we made an investigation of the ingredients of these various
53 products that were on the market. We bought samples of every one we could find on the market and each sample stated on its package of what it was made. We experimented with those ingredients as shown upon these samples and made up a product of the same ingredients as shown on the products. We called our product Southern Nut Product. Our particular reason for so calling it was because in naming, first, you have to pick out a name that is not being used by anyone else, so far as you can determine. We selected the name of "Southern," after giving it consideration, as being a name that was a handy word to everyone; everyone knows

that word and uses that word in this part of the United States, and then we combined that with the words "Nut Products," and perhaps added to our thought of occupying the principal panels of our package with these words in bold type, so that there could be no question in anybody's mind when they looked at that package as to what it was.

By Mr. MURDOCK. I show you plaintiff's Exhibit No. 3 for identification, being a carton of a product, and ask you to explain to the court what it is.

By Mr. NICHOLSON. That is a one-pound package of our products, which we have manufactured and sold since April, 1928, under the label of Southern Nut Products. It is made of cocoanut oil, peanut oil, salt, water, and artificial coloring. The proportion of each ingredient does not remain constant in the various seasons we have in Florida. It varies for this reason, that in warmer months you must manufacture a harder product or it won't stand shipping. Peanut oil is a soft oil, it is a liquid oil at ordinary temperature, and we use less peanut oil in the summer time than we do in the wintertime, or we use less peanut oil the year round here than we would if we were in a colder climate, because if we didn't the product would be so soft we couldn't deliver it to the customer in decent shape. Our carton shows outside on the two principal panels, first, "One pound net." Then in bold type, "Southern Nut Products, artificially colored." On the two secondary panels, I say two secondary side panels, we make this statement: "This product is sold to you entirely on its merits as a nut product, made from cocoanut oil, peanut oil, water, and salt, and is not sold for a substitute for any other product. For cooking, baking, and seasoning. Keep in a cool, dry place." On the end panels we show our name and location, "Standard Nut Margarine Company of Florida, Jacksonville, Florida." On the inside the package is subdivided into four cubes of four ounces each, the four of them together making a one-pound package. Each quarter pound print is wrapped in vegetable parchment upon which is printed the legend, "Four ounces, net weight, Southern Net Products. Pure, clean, and wholesome. Made from pure cocoanut and peanut oils." In comparing the sample of Southern Nut Products with the sample of Higgins Nut Products, the colors are as near identical as we can make them. I have tasted Higgins Nut Products and Southern Nut Products many times, and the taste is the same. There is no odor to either of them.

54 By Mr. MURDOCK. As to the salt content, are they the same as to the amount of salt?

By Mr. MCCONNELL. I object to that; he has already testified he doesn't know what the contents of Higgins Nut Product is; he has not analyzed it.

By the COURT. Objection sustained; exception noted for the plaintiff.

By Mr. MURDOCK. I offer in evidence plaintiff's Exhibits 3 and 2. I don't know that I formally offered Exhibit 2.

By the COURT. Very well; they will be received.

(Whereupon plaintiff's Exhibits Nos. 2 and 3 were filed in evidence.

Whereupon Mr. Nicholson further testified as follows:)

When the corporation began manufacturing I found four different products on the market similar to Southern Nut Product. These products were Higgins, Nut-Z-All, Penobscot, and Nu-ine. Before beginning the manufacture of Southern Nut Product I investigated the history of Higgins Nut Product to find out what the product was. I followed the discussion of the Treasury decision that came along through the department here. I discussed it with another manufacturer, with salesmen from time to time that came along from various carton manufacturers and parchment paper manufacturers and oil refineries. I also made a very careful investigation to find out if these products were taxable.

By Mr. MCCONNELL. Just a minute. Which product are you speaking of, Higgins Nut Product?

By Mr. NICHOLSON. Well, all of them, for that matter. I was familiar with Treasury Decision No. 3590, which was sent out by the department, had a copy of it, in which the product Nut-Z-All was declared not taxable.

By Mr. MURDOCK. I show you a pamphlet marked for identification "Plaintiff's Exhibit 4," and particularly that part found on pages following thirty-five, and designated T. D. 3590, and ask you to state if that is what you received in the way of information from the Treasury Department?

By Mr. NICHOLSON. Yes, sir; this is the Treasury decision that covers the same.

By Mr. MURDOCK. May it please the court, this is a Treasury decision circular by the Treasury Department, which sets out the following decision of the United States District Court for the District of Rhode Island, in the case of Higgins Manufacturing Company versus Frank A. Page, collector. It is published for the information of collectors and others concerned; D. H. Blair, Commissioner of Internal Revenue. I offer in evidence Treasury Decision 3590, contained in this book of Treasury Decisions.

By Mr. MCCONNELL. No objection.

(Whereupon said document was filed in evidence and marked "Plaintiff's Exhibit No. 4.")

55 By Mr. MURDOCK. I particularly call attention to two paragraphs, the first paragraph following: "Brown, Judge: This is an action for the recovery of $16.50 paid under protest as a tax at the rate of ten cents per pound upon 165 pounds of nut products known as Nut-Z-All, a compound containing no animal fats or butter, but composed of cocoanut oil, peanut oil, salt, and artificial coloring matter, which gives it a shade of yellow." And also the four lines on page 39 as follows: "In making one hundred pounds of Nut-Z-All are used eighty pounds of cocoanut oil, twenty pounds of peanut oil, three pounds of salt, and one-tenth of one per cent of butter

coloring. This is substantially different from the products composed of animal fats as butter and milk fats, which were known at the date of the enactment of statute."

By Mr. McCONNELL. If counsel is going to put the regulations in evidence, I propose he put the whole regulation.

By the COURT. He is putting it all in. He is just calling attention to certain parts of it.

(Whereupon Mr. Nicholson further testified as follows:)

When the corporation begin the manufacture of Southern Nut Product I was familiar with Treasury Decision 3590, giving the formula as to the ingredients of the Higgins product and endeavored to make our product as near like that as possible.

By Mr. MURDOCK. I show you a carton marked "Plaintiff's Exhibit 5" for identification and ask you examine that and state whether a product the same as Southern Nut Product was packed and sold in that carton in your market here.

By Mr. NICHOLSON. Mr. Murdock, this carton is the carton of the Baltimore Butterine Company. They formerly called this product Nu-ine, but they have changed the name of it on this carton to the word "Nut-ie." However, that is the same product.

By Mr. McCONNELL. I object to this. There is no proper foundation laid that he ever analyzed this product or knows anything about it.

By Mr. MURDOCK. It is simply a matter of change of name because of the infringement on the part of persons.

By Mr. McCONNELL. He has not shown any qualifiations that he ever analyzed the product or knows the content of it.

By the COURT. You may ask him some questions about it.

By Mr. McCONNELL. Have you ever examined or analyzed this Nut-ie?

By Mr. NICHOLSON. Not Nut-ie.

By Mr. McCONNELL. Or the Baltimore butterine products?

By Mr. NICHOLSON. I have never made an analysis of it.

By Mr. McCONNELL. Then you don't know what the contents are of it?

By Mr. NICHOLSON. All I know is what they say on the carton.

56 By Mr. McCONNELL. Then I object.

By the COURT. Objection sustained. The only evidence he knows is on the carton. Exception noted for the plaintiff.

By Mr. MURDOCK. Now, Mr. Nicholson, I will ask you if you ever made any investigation as to whether Higgins nut product is being sold upon the market in Jacksonville at the present time?

By Mr. NICHOLSON. I have.

By Mr. McCONNELL. To which we object on the ground it is incompetent, immaterial, and irrelevant; has no probative value so far as the issues in this case is concerned.

By the COURT. Objection overruled; exception noted for the defendant.

By Mr. MURDOCK. State whether or not—explain to the court what investigation you made of this matter and when?

By Mr. NICHOLSON. I went out after court yesterday and bought three individual pounds from three grocers. Do you want the names of those stores?

By Mr. MURDOCK. It might be well to put it in the record.

By Mr. NICHOLSON. This pound here was bought from Clark's Market in South Jacksonville.

By Mr. MCCONNELL. To save any further objection, we have a general objection to all this line of testimony.

By the COURT. Yes; and an exception noted.

(Whereupon Mr. Nicholson further testified as follows:)

This product was being offered for sale by this store which sold me one pound of Higgins Nut Product yesterday afternoon. Then this pound I obtained yesterday afternoon from Farris, F-a-r-r-i-s Grocery and Market, at 402 Davis Street. I obtained one more pound from Haddad Grocery and Market, at Pearl and Orange. Then I went to the Daylight Grocery Company, at 308 Broad Street, and asked them to call the wholesale dealer of Higgins Nut Product and purchase a case, which they did, and in turn sold it to me this morning. I have there the invoices from the wholesale dealer to the Daylight Grocery and the invoice or bill of sale from the Daylight Grocery to me of one case, sixteen pounds, of Higgins Nut Product in quarter-pound prints, which is that case there. That case is marked with the wholesaler's name stenciled upon it as it was shipped to him, Farris & Company, Jacksonville.

By Mr. MURDOCK. Now, Mr. Nicholson, were any of these purchases of Higgins Nut Product that you bought tax paid as oleomargarine?

By Mr. NICHOLSON. None.

By Mr. MCCONNELL. I object unless he shows qualification whether he had any knowledge.

By Mr. MURDOCK. Do you know whether they were taxable or not?

By Mr. NICHOLSON. I know positively that that box is not tax paid.

By Mr. MURDOCK. How do you know that?

57 By Mr. NICHOLSON. Because there is no revenue stamp on it and no indication it has been tax paid.

By Mr. MURDOCK. I show you a document marked for identification purposes, "Plaintiff's Exhibit 6," and ask you to state what that is.

By Mr. NICHOLSON. That is a bill of sale from the Daylight Grocery and Market, on 308 Broad Street, to me personally, for sixteen pounds of Higgins Nut Products, which was bought to-day and marked paid on March 4, 1930.

By Mr. MURDOCK. I offer that in evidence as plaintiff's Exhibit 6.

By Mr. MCCONNELL. To which we object upon the ground it is immaterial, irrelevant, and incompetent. May it please the court, I don't see the materiality of all the purchases.

By the COURT. I see a very great deal of materiality. The objection is overruled.

By Mr. MCCONNELL. Exception.

By the COURT. Exception is noted. It is showing the conditions that the bill of complaint objects to; it is very material.

(Whereupon the paper referred to was received and filed in evidence and marked "Plaintiff's Exhibit No. 7.".

Whereupon Mr. Nicholson further testified as follows:)

I am familiar with the business of this line of products in this territory and in this State. It is a matter of common knowledge among people in this business that the Higgins Nut Product has not been required to pay any oleomargarine tax or their dealers take out a special license. We have been solicited to handle and deal in Higgins Nut Product because it did not require the payment of a tax. The Higgins Manufacturing Company have wired, written, and personally called upon us—called upon me individually and upon me as representing the company, have asked us to try—to sell us upon the proposition of taking for distribution their product, an exclusive agency for this product throughout the Southeastern States. Their proposition was to ship it to us at Jacksonville in carload lots and have us sell it to the trade throughout the Southeastern States with our sales organization. They came to us with a proposition guaranteeing us—or guaranteeing us and our customers—to be free from any harm that might come from any future tax or license that might be assessed—they agreeing to assume that responsibility, take it off our hands. They urged us to take the product. We sold Southern Nut Product tax free up until September of this—of 1929—the exact date I don't remember. And we sold some—a part of our output in September, 1929, was tax free and the other part was tax paid. Since that time it has all been tax paid as colored oleomargarine. Then we stopped selling it tax free because the department ruled that it was taxable, and issued broadcast information; they told us and they told everybody else that all the dealers would have to have a license, wholesale and retail license, after October 1st, and give them that much time to
58 clean up their stock. Told us it would be tax paid. They issued instructions to the collectors of all the districts that all such products would be tax paid. At the time this notice was broadcast the extent of our business in this product was over one hundred thousand pounds a month. We had twenty jobbers. The jobbers had retailers, of course, but we sold in this territory over which we—we cover the section around Jacksonville with salesmen of our own and act as our own wholesale agent at this point. We were selling this product to approximately, well, from two hundred to two hundred fifty retail accounts at the time the tax went on, and twenty wholesale accounts. At the present time, after being required to treat this as oleomargarine and tax pay it as the same—we have three wholesale accounts and not over two hundred seventy-five retail—that is, the jobbers and all. We, as a jobber, only have about thirty-five

retail accounts now. Prior to the ruling by the department there were two of our twenty jobbers who had oleomargarine licenses and dealt in oleomargarine. Under the department's ruling we didn't dare to sell to any dealer or wholesaler who did not have a license. A demand has been made upon us for the payment, as a manufacturer, of tax upon our product.

By Mr. MURDOCK. I show you plaintiff's exhibit for identification purposes number nine, and ask you to explain to the court what that is.

By Mr. NICHOLSON. Well, this is a notice and demand for tax, which was served upon us in April, 1929, the description, stamp tax at ten cents per pound as colored oleomargarine on fifty thousand pounds of Southern Nut Product manufactured during January, 1929.

By Mr. MURDOCK. Have you ever paid that tax?

By Mr. NICHOLSON. That tax has not been paid. Refused to pay it.

By Mr. MURDOCK. Is there demand still being made for it?

By Mr. NICHOLSON. Demand still stands; assessed on the books against us.

By Mr. MCCONNELL. I object as not responsive—asking if demands are still being made.

By the COURT. Read me the objection.

By the REPORTER. Objected to as not responsive.

By the COURT. Is that all the objections?

By Mr. MCCONNELL. He asked him if he was still making demand; he says, "No; the demand still stands." In other words, as I understand it, there was one demand made.

By the COURT. Well, he has never paid it; that is sufficient. The object is sustained; exception noted.

By Mr. MURDOCK. I offer in evidence plaintiff's Exhibit No. 9. Would the court care to examine it?

By Mr. MCCONNELL. No objection.

(Whereupon said paper was admitted in evidence and filed as plaintiff's Exhibit No. 9.

Whereupon Mr. Nicholson further testified as follows:)

59 We had a mimeographed memorandum from the revenue department and which was broadcast to the trade, stating that our product would be taxable after October 1st and our jobbers and retailers also required to hold license. We didn't know what to do with respect to our retailers' licenses when this tax went on. We wanted to stay on the market. In order to do that we would have to pay a tax of ten cents a pound. We wanted to keep our salesmen employed so we wouldn't have to discharge them, as well as *as* much of our factory help as possible. Wanted to maintain our identity with the trade. We would have to pay a tax of ten cents a pound, retailers would have to have a license; their licenses had to start the first of October, must be prepaid through June 30th following; that meant thirty-six dollars a store. We went out and talked to retail dealers first, and we discovered that they were very sympathetic to our cause,

and very much opposed to this tax. And we determined that if we could make them some sort of a fair proposition, that is, a proposition that would demonstrate our willingness to do everything possible to keep the situation going and keep it alive, that they would accept it. So we made the general proposition to retail dealers that if they would take out, or make an application for this colored retail license at thirty-six dollars, we would furnish half the money. In other words, they pay eighteen and we pay eighteen. And we paid over four thousand five hundred dollars cash money into this license. Those licenses expire June 30, 1930. Under the present conditions it would be impossible for our company to continue to exist and sell its products in competition with the Higgins Nut Product, which is tax free, and continue to pay these licenses and the tax. Our approximate wholesale price on Southern Nut Products is twenty cents besides the tax.

Cross-examination by Mr. McCONNELL:

Q. How long have you been manufacturing these products here in Jacksonville?

A. Which products do you refer to, Mr. McConnell?

Q. This nut product.

A. Since April, 1928.

Q. And before that time you were engaged, were you not, in the manufacture of what you call the Southern Nut Oleomargarine?

A. No; we were not.

Q. Aren't you manufacturing now an artificial nut product oleomargarine?

A. We are not.

Q. Outside of this product?

A. No—yes; Standard Nut Margarine.

Q. Did you ever, at any time, manufacture before this—the manufacture of this nut product—an artificially colored oleomargarine?

A. Oh, yes.

Q. And you were in that business at the time that you went into the manufacture of this Southern Nut Product?

60 A. Yes.

Q. Why did you want to go into—manufacture the Southern Nut Product?

A. To protect our business.

Q. In what way?

A. We weren't able to compete with the tax-free goods and pay ten cents a pound and help dealers buy licenses at forty-eight dollars a year.

Q. How many places are selling this Higgins product here now in Jacksonville?

A. That I couldn't say.

Q. Do you know of over one or two places?

A. Yes.

Q. How many would you say are selling it?

A. I bought in four places yesterday afternoon.

Q. Have you any idea, during your investigation, have you formed any opinion as to how many pounds daily is being sold here, from your investigation?

A. It would be impossible for me to form a conclusion to that effect.

Q. Do you know how many pounds daily, or how many places are handling this Higgins product in Miami?

A. No.

Q. You made no investigation?

A. No, Mr. McConnell; we don't call—our salesmen, you understand, are working the retail trade; that is, these colored licenses, and they are selling our product.

Q. But you are contending that this product is putting you out of business on account of the competition. Now, I want to find out if you know how many places are handling this product in the State of Florida; how many places it is being sold.

A. No; but I know it is being generally sold.

Q. Have you got any idea as to the number of pounds being sold in the State?

A. I have not. I have no way of arriving at that opinion.

Q. How many pounds of that Southern Nut Product did you manufacture in October?

A. In October, this year? Approximately forty thousand pounds.

Q. And November, how many did you manufacture?

A. It has run fairly close to that figure ever since then.

Q. And in January you manufactured sixty thousand pounds, about?

A. No.

Q. How much?

A. I didn't manufacture as much in January as I did in December and November.

Q. You are filing returns now to the collector's office, are you not?

A. I am.

61 Q. Do you remember what those returns show for the month of January this year?

A. Not exactly; I haven't the exact figures. But those figures included both colored nut margarine—that is, oleomargarine, you understand, and colored nut products. We have to make up a return in Form No. 216; the front sheet of which shows how many revenue stamps we buy, then it shows how much goods withdrawn tax paid during the month. Now, that will account for so many revenue stamps, subtracted from the balance forward, balance purchases, subtract your tax paid, leave you a balance on hand; and the Government reports which we are now submitting on colored ten-cent tax-paid goods includes both the colored nut margarine and the Southern Nut Products.

Q. But you say you have been making at least forty thousand pounds or more per month ever since?

A. Approximately forty thousand pounds.

Q. It hasn't been dropping off at all, has it, since October?

A. It has.

Q. If you have been making forty thousand pounds since October a month, how has it been falling off? The trade hasn't been falling off?

A. The poundage is dropping slowly; it is slow death, Mr. McConnell. It is gradually dwindling.

Q. How slow is it dropping; how many pounds are you losing a month in the manufacture?

A. Well, it seems currently we are losing a couple of thousand pounds a month, as the months go along; when it is winter time we should be increasing.

Q. The price of butter in the State of Florida right now is way down, is it not?

A. The price of butter is pretty variable.

Q. Right now it is very low?

A. Butter is very low.

Q. You sell this Southern Nut Product for approximately forty cents a pound, don't you—thirty-nine to forty cents?

A. It retails from thirty-five to forty cents.

Q. And the price of butter at the present time is below that, is it not?

A. The lowest I have seen butter advertised is thirty-five cents; and it sells all the way up to fifty-five and sixty cents a pound.

Q. Butter is a competitor in your market, is it not, your Southern Nut Product market?

A. As a cooking compound, it is.

Q. Well, for all purposes that cooking compound is used for butter is a competitor, isn't it?

A. When butter gets that cheap it perhaps has some effect upon the market of this kind, because people find they can buy butter for thirty-five cents a pound; they take that home to fry with and make their cakes with.

62 Q. Do you use this product, your Southern Nut Product, for the purpose of frying, baking, cooking?

A. Yes.

Q. It is used for a spread on bread, too, is it not?

A. I don't use it for a spread on bread.

Q. It can be used?

A. We don't recommend it for that.

Q. It can be used?

A. If softened enough, certainly; anything can be used——

Q. It is suitable for that purpose?

A. Not suitable or desirable.

Q. It could be used that way?

A. If you soften it enough, as anything else of a plastic consistency can be spread upon bread.

Q. Your artificially colored oleomargarine is used for a spread on bread?

A. That made with more peanut oil; it is made with milk and milk is——

Q. You mean it is churned in milk?

A. It is churned with milk—in milk; yes. That milk is a natural emulsifying agent and splits that fat down to almost the consistency of butter; that makes it——

Q. Practically the only difference between your colored oleomargarine and your Southern Nut Product is about the nine per cent of casein in the milk that is in it, therefore——

A. Milk and the benzoate of soda.

Q. And there is about nine per cent of casein; in other words, milk is about ninety-two per cent water, isn't it?

A. Well, the way we make——

Q. Well, isn't it? Isn't that a matter of fact, milk is about ninety-two per cent water?

A. That is perhaps approximate.

Q. You have about eight per cent casein in it?

A. Yes.

Q. Casein has no food value, has it?

A. Yes.

Q. What?

A. Yes.

Q. The purpose of casein, and the only thing it does, is to make a smoother product?

A. Makes it smoother and gives it a butter flavor; butter gives its flavor from this casein that is left in the butter; when you churn butter you have a certain amount of sour milk, and your butter fat is never completely isolated from the milk, and that milk sours——

Q. Are you a chemist?

A. Why, I have studied chemistry. I don't qualify myself as a chemist.

Q. You don't qualify as a chemist?

A. No.

63 Q. And you never have made an analysis of these other products?

A. I have no equipment for analyzing.

Q. When you went into the manufacture of these products you got a copy of this letter here which is plaintiff's Exhibit 1, from the collector's office?

A. Yes, sir.

Q. And you knew in this letter that these products were held by the Government to be taxable?

A. I knew before that that they had.

Q. You knew this letter said these products were held to be taxable?

A. I knew before that that they had.

Q. You knew this letter said these products were held to be taxable?

A. No; that said we may make a product of that kind without tax-paying same.

Q. What did you think when you read this: "While this office considers such compounds are properly taxable under the law, under certain decisions at the present time, there is no attempt being made to hold them taxable at the present time."

A. I thought that was just a repetition of the proposition they had brought into effect by promulgating Treasury Decision 4006, which said all these products would be taxable on a certain date; if I remember correctly, October 1, 1929. Then they later amended that and said, "We will wait until January," and "Wait until July"; and then they came along and threw the whole thing out, said, "We can't tax it."

Q. But you knew at the time that you made the inquiry the department considered them taxable?

A. I know they wanted to make them taxable. They said in that letter they held them taxable.

Q. Well, the letter simply said they weren't collecting the tax at the present time; and you knew the department had determined them taxable?

A. Yes; they weren't holding the——

Q. So, with that knowledge, you went into the manufacture?

A. They said there were——

Q. But they said you went in there practically at your own peril; the letter infers that.

A. The letter says that they can't tax them, and we should be entitled to the same privileges being enjoyed by the other manufacturers, without taxpaying the same; and that was the authority right there that we took; and we obtained that authority before we ever manufactured a pound of this. We wouldn't go off without knowing——

Q. This is the only authority or communication you have ever had from the department with reference to these products?

64 A. Oh, we have several other communications; we have a tax demand.

Q. I mean communications, whether or not you would be liable for tax.

A. The collector was advised here, and I think we have a copy of that letter, that our stuff would be taxable, last fall when we started tax-paying it.

Q. That is the general letter that went out?

A. I think so; yes.

Q. When you first started to manufacture this stuff, how much were you making of it?

A. We didn't make a great deal to start with.

Q. When is the time you had the largest production and sale of this product?

A. I guess last September—October; I mean September and August.

Q. Now, when you went into the manufacture of this product, you used the same machinery you used for making your nut oleo?

A. We got a ruling on that.

Q. And you used the same products that went into the oleomargarine, except that is churned in water, and the other is churned in milk?

A. Yes; and the preservative.

Q. When this product came into the market down here, that was a competitor of butter, wasn't it, the Higgins product? That was a competitor of the butter market?

A. We don't sell butter.

Q. I am not asking you that; I am asking if the Higgins product wasn't a competitor of butter?

A. It was competing with our product.

By Mr. McConnell. I move to strike his answer—just a minute: I am asking you, when the Higgins product came down here, was it not a competitor on the butter market?

A. I should answer that question yes, Mr. McConnell just——

Q. Just a minute——

By the Court. Let him explain.

A. Just the saame as lard or any kind of shortening you see on the market, or compound lard, is a competitor of butter. If you put lard in a skillet and fry a steak with it, and you have been using butter, you are substituting for butter, you can't help it if you do it. And certainly this product would substitute for butter in that case; there is no way you can reason out any other conclusion.

By Mr. McConnell. I move to strike all the answer as not responsive to my question yet.

By the Court. The motion is denied, and exception noted.

Q. How much of your artificially colored oleomargarine were you selling at the time you went into the manufacture of Southern Nut Product?

65 A. The Government has a record of that.

Q. Well, do you know?

A. Probably, as near as I can remember, twenty to thirty thousand pounds a month.

Q. Of artificially colored oleomargarine?

A. I won't substantiate that; I can't remember definitely, but it was no great amount greater than that.

Q. And have your sales of that increased or decreased since you went in the manufacture of Southern Nut Products?

A. They have almost held their own. They have stayed along very well, because we had a certain line of trade that we have always continued to sell the tax-paid goods to right straight through; retailers who are handling the artificially colored nut oleo on the license of forty-eight dollars a year, of course discontinued that and started handling the other; that took away some business.

A. Well, Mr. McConnell, we are assessed on that basis and we are violating right now the Government—the commissioner's——

Q. And you filed a claim for compromise of that tax?

A. May I explain the way we are assessed for that?

Q. Yes; I know.

A. The commissioner sent the collector here a letter telling him that this stuff was not taxable. Here was an assessment of five thousand dollars on an arbitrary estimated amount of fifty thousand pounds for January, 1929. He said, "Send the deputy, personally deliver this assessment, and have the deputy go over the records of that company and ascertain the number of pounds, and then we will make a correct assessment." We simply said at that time that "These goods are not oleomargarine. You have no right to the record and we refuse to pay and we refuse to let you inspect." And the letter sent to the collector, "If you are refused this, don't do anything else until you write to us." And so I did refuse it, and that was the last that has been heard of it. But they haven't abated this tax or taken it off. It still stands against us.

Q. The offer in compromise is still pending before the commissioner?

A. Our understanding is that that offer is not going to be accepted.

Q. You have no communication that they won't accept it?

A. No.

Q. You know, as a matter of fact, that all the concerns over the United States submitted offers in compromise the same as you did?

By Mr. MURDOCK. I object. That is going rather far afield from what applied to this particular plaintiff.

By the COURT. The objection is overruled; exception noted.

68 Q. Read the question.

A. Well, I know what the question was.

(The question was read by the reporter.)

Q. That is, I mean concerns manufacturing products similar to yours.

A. I don't think Higgins Manufacturing Company did.

Q. Practically all of the others?

A. I don't know who all the others were, Mr. McConnell, but a great many of them did; yes.

Q. And the commissioner suggested at the time of your conference in Washington that you file these offers in compromise?

A. I believe that is correct.

Q. And that in due course, as soon as the matters could be determined by the Supreme Court, that these would be acted upon; is that true?

A. You are getting into a matter of understandings there.

Q. That was at the conference?

A. I am not in position to testify competently on—our thought of the thing was that they were going to wind up the whole business and stop everybody and compromise it and settle it; that was what they wanted to do. And our understanding was they were going to

accept our offer to compromise and put everybody on the same footing. And it was our understanding that Higgins was to be stopped.

Q. Outside of the Higgins people, do you know of anybody else manufacturing these products now?

A. We are manufacturing them.

Q. Outside of you and the Higgins people?

A. No.

Q. They all filed their offers in compromise and decided to keep manufacturing these products?

A. That was the proposition.

Q. And the understanding was with the commissioner that some nominal amount would be accepted?

A. Yes, sir.

Q. Back taxes as they accrued?

A. That is right.

Q. And if the Supreme Court should decide the products not taxable, therefore there would be nothing due; that was understood, wasn't it?

A. That would be assumed.

Q. And that the offers in compromise would be held there until the court had determined?

A. I didn't have that understanding.

Q. Didn't you learn that through your counsel that the Government is making no move to put anybody out of business or
69 collect any of this tax at the present time? Hasn't your counsel advised you of that?

A. That we are——

Q. That the Government is making no move to collect any of this tax or to put any concern out of business until the Supreme Court of the United States has fully determined the taxability of these products?

A. That that has happened?

Q. Hasn't your counsel advised you of that?

A. I haven't understood that at all.

Q. Your counsel has never advised you of that?

A. No.

Q. Have you made any inquiry as to what the attitude of the department was going to be?

A. We didn't need to make any. We knew what the attitude of the department was.

Q. With reference to putting you out of business?

A. Yes, sir.

Q. What reason have you to say that the Government is going to seize or take your plant for the payment of these taxes?

A. Just the general attitude of the department.

Q. Has any overture been made by any officer of the Government to seize your property or confiscate it?

A. Yes.

Q. Any effort been made to seize or confiscate your plant for back or future taxes?

A. It seems to me that——

Q. Will you please answer my question?

By the COURT. Read him the question.

(The question was read.)

A. No.

Q. And you have no fear right now that the Government is going to come in and seize your plant or interfere with your business in any way whatsoever until these products have been determined taxable by the Supreme Court of the United States?

A. I don't have any—I don't feel very certain about the situation at all. What I mean is I feel like there is—with the department having rumored these products to be taxable, on top of the fact that they told us to go ahead and make them, then they came around and said they are taxable; it is hard to tell what might happen. We feel very uneasy about it.

Q. That wasn't what I asked you. I will put it this way: Have you any basis or grounds for believing that any harm will be done your business or your plant by the Government in attempting to force or collect any taxes until this matter has been decided by the Supreme Court?

A. I know that the history of the department——

70 Q. Answer my question.

A. Yes.

Q. What is your fear; what is it based on?

A. The history of the department's action is that when they get the upper hand of the situation they make it mighty hard for the taxpayer.

Q. That's your only answer?

A. That is my answer.

By Mr. MCCONNELL. That's all.

Redirect examination by Mr. MURDOCK:

Q. Mr. Nicholson, I show you a document marked for identification "Plaintiff's Exhibit No. 10" and ask you to explain to the court what that is, if you know. When did you see it before and where did you get it?

A. This is a copy of a letter sent out by the commissioner, Mr. Lucas, to the collector of internal revenue on August 24th, and he says there that it is the purpose of the bureau——

By Mr. MCCONNELL. Just a minute.

By the COURT. Don't read the letter.

A. Well, this is the letter where they tell you your stuff has got tax on it.

Q. Where did you get that?

A. I got that through the mail from the department here.

By Mr. MCCONNELL. What is this, a copy? Just a moment, if the court please, may I ask the witness a question?

By the COURT. Yes.

By Mr. McConnell. Where did you get this?

A. As I remember, that letter came to me through the mail from the local office.

Q. Was there any other letter or communication with it?

A. No; they multigraphed this—that is not the one received here; no.

Q. Where did you get that?

A. I don't remember whether I sent this—I probably sent this to counsel and he probably made a copy of it; I don't know.

By Mr. McConnell. I object to it on the ground that it is not the best evidence; that is a copy.

By Mr. Murdock. This is the same as the one you received from the local collector's office?

A. Yes.

By the Court. Objection overruled; exception noted for the defendant. Let it be received in evidence.

(Whereupon the letter referred to was received in evidence and marked "Plaintiff's Exhibit No. 10.")

By Mr. Murdock. I would like to read this letter to the court. It is dated August 24, 1929.

(Whereupon the letter was read to the court by Mr. Murdock.)

71 Q. Mr. Nicholson, state whether that letter was given publicity in this district through the newspapers, and other ways.

A. It was. It was handed to the newspapers. I know that the department here gave the letter to the Times-Union, the local newspaper here, and was published, a rather distorted article, as they twisted it around and made it even worse than it was.

Q. As a result of that letter, or at least on October 1, 1925, were you able to continue selling to these customers who did not have retail license?

A. Oh, no; I wouldn't dare.

Q. And you have not since that time?

A. No, sir.

Q. Now, a matter of compromise was mentioned here on cross-examination. Was it your understanding that that nominal offer and compromise should be immediately accepted by the department?

A. That was my understanding.

Q. Was that the understanding given to you by the deputy commissioner?

A. I didn't attend that conference, Mr. Murdock, you remember.

Q. I see. When was that compromise offer made to the Government, if you know?

A. It was made in September, I am pretty sure.

Q. 1929?

A. 1929.

Q. Have you ever heard of it being accepted?

A. No.

Q. Has it ever been accepted?

A. No; not to my knowledge.

Q. Now, you stated that from October you have been able to sell about forty thousand pounds of Southern Nut Product per month. What was the amount sold prior to that time per month?

A. Three to four times that much.

Recross-examination by Mr. McConnell:

Q. Was any of that loss of your alleged business due to any other cause that you know of?

A. No.

Q. Might it have been due to that?

A. Sir?

Q. Might it have been attributed to some other cause other than the tax of the product?

A. I am quite well convinced I would not have gone backward in business, Mr. McConnell, had not the tax gone off. We would have been in stronger position to-day than when we started.

Q. In other words, you say the loss of business was due to the tax being put on?

A. And the license.

Q. Do you know, as a matter of fact, the Government has been undertaking to get evidence of the Higgins product?

72 A. You have stated that to me.

Q. Do you know the agents of the department have been getting evidence throughout the State for the purpose of——

A. You asked me for names or places where you could do that.

Q. You told me you did not know of any.

A. I told you it was not my business.

Q. Still you say they are interfering with your business indirectly, because you want to——

A. We contend if they can make a tax-free product of this kind, we can do the same thing. We don't have to buy their product from them and sell it.

Q. Didn't I ask you this, if the Government stopped the Higgins people from manufacturing, would you voluntarily stop?

A. We would not voluntarily stop; no.

Q. In other words, you want to manufacture this stuff tax free, irrespective of competition or anything else?

A. Our contention is that this is a tax-free item. That is why we are in court.

Q. And that is the purpose of this suit, to have this court hold it tax free?

A. Yes; same as the other people.

By Mr. McConnell. That's all.

(Whereupon the witness, Mr. Nicholson, was excused.)

By Mr. Murdock. The plaintiff rests, your honor.

Motion to dismiss

By Mr. McConnell. At this time, may it please the court, the defendant wishes to renew the original motion of yesterday for a dismission, upon the grounds as set forth therein, which is in the following words and figures, to wit:

1. The bill filed herein does not state facts sufficient to entitle plaintiff to any relief, there being no equity stated therein.

2. The court is without jurisdiction of the cause by reason of the fact there is a defect in the parties appearing upon the face of the bill, in that the United States of America is a necessary and indispensable party to said cause, and not having consented to be sued, and not being a party to said cause, the court is without jurisdiction to proceed.

3. The court is without jurisdiction to restrain the collection of the tax in question, the bill disclosing that an assessment has been made by the Commissioner of Internal Revenue according to law; that by reason of the provisions of section 3224 of the Revised Statutes of the United States, this action is prohibited, and the court has no jurisdiction to restrain the collection of the tax.

4. The Commissioner of Internal Revenue having determined said product, Southern Nut Product, to be taxable pursuant to and in accordance with the provisions of the act of 1886, as amended, as disclosed by the bill, and that authority, and the authority being invested in him to determine said products pursuant to and in accordance with the provisions of section 14 of the act, the court has
73 no jurisdiction to review the acts of the said commissioner as to the taxability of the said product.

5. That the bill seeks to enjoin future assessment of taxes and by reason thereof this court has no jurisdiction to entertain said cause.

6. Said action seeks to refrain the Commissioner of Internal Revenue, not a party to this action, from assessing or attempting to assess future taxes against said parties, and by reason of the fact said commissioner is not made a party to said action and can not be made a party to said action by reason of not being within the jurisdiction, said court has no jurisdiction to proceed in said cause.

And I have an additional ground to add:

7. That the evidence before the court is insufficient to prove any of the averments of the plaintiff's bill, and is insufficient to establish any equitable relief as prayed for therein.

By the Court. Motion denied, exception noted for the defendant.

By Mr. McConnell. The defendant rests.

By the Court. Let a decree be entered in accordance with the prayer of the bill. I think the essential averments of this bill have been shown here. This testimony shows that the Government has put everybody out of business manufacturing this product except the Higgins Products Company, and this man, who seems to be hanging on by his eyelash. I think he is entitled to the relief prayed for.

You submit the form of the order to Mr. McConnell, and let the bond be the same as it was in the other.

By Mr. McCONNELL. May we have our exception?

By the COURT. Yes. Exception noted.

By Mr. McILVAINE. If the court please, there would be no bond in a final decree.

By the COURT. Oh, no; that is true.

By the COURT. Court will stand adjourned until further order.

I do hereby certify that the foregoing statement of evidence contains in condensed and narrative form the substance of the evidence introduced in the trial of the foregoing cause, save when a proper understanding of the questions presented require parts of the testimony to be set forth otherwise, it being my judgment that, for a proper consideration of said cause upon appeal, it is necessary that certain parts of the evidence be reproduced in the exact words of the witness, together with the exceptions and other proceedings during the progress of said trial.

Done at Jacksonville, Florida, this 30th day of September, A. D. 1930.

(Signed) ALEXANDER AKERMAN,
United States District Judge

[File indorsement omitted.]

74 In United States District Court

[Title omitted.]

Notice of præcipe indicating portions of the record to be incorporated into the transcript upon appeal

Filed Sept. 18, 1930

To THE STANDARD NUT MARGARINE COMPANY OF FLORIDA,
A Corporation, Jacksonville, Florida.
Messrs. GEO. W. MURDOCK,
MILAM, McILVAINE & MILAM,
Solicitors for the Standard Nut Margarine Company of Florida, a Corporation, Appellee,
Greenleaf & Crosby Building,
Jacksonville, Florida.

SIRS: Please take notice that the appellant's statement of the evidence in this cause was this day lodged in the office of the clerk of the United States District Court for the Southern District of Florida for your examination; and that on the 30th day of September, 1930, in the United States court rooms, Jacksonville, Florida, at 9.45 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, we will ask the Honorable Alexander Akerman, United States district judge, to approve said statement; and you and each of you are hereby requested to serve upon us, on or before the 29th

day of September, 1930, your objections and proposed amendments, if any, to said statement.

Please take further notice that the appellant designates the following as the portions of the record in this cause to be incorporated into the transcript on his appeal: (1) Bill of complaint; (2) chancery subpœna; (3) answer of defendant; (4) preliminary injunction; (5) injunction bond; (6) motion of defendant for leave to file amended answer; (7) stipulation as to filing of amended answer; (8) order allowing filing of amended answer; (9) amended answer of defendant; (10) final decree in favor of complainant and making temporary injunction permanent; (11) notice of appeal; (12) petition for appeal; (13) assignment of errors; (14) prayer for reversal; (15) order allowing appeal; (16) præcipe for record; (17) amended præcipe for record; (18) motion for an order allowing the withdrawal of the citation from the office of the clerk of the United States District Court for the Southern District of Florida for the purpose of the service of said citation and the refiling of the said citation after said service of the same; (19) order
75 allowing the withdrawal of the citation from the office of the clerk of the United States District Court for the Southern District of Florida for the purpose of the service of said citation and the refiling of the said citation after said service of the same; (20) motion for an order allowing the withdrawal of the præcipe for record and the amended præcipe for record from the office of the clerk of the United States District Court for the Southern District of Florida for the purpose of the service of said præcipe for record and amended præcipe for record and the refiling of the said præcipe for record and amended præcipe for record after said service of the same; (21) order allowing the withdrawal of the præcipe for record and the amended præcipe for record from the office of the clerk of the United States District Court for the Southern District of Florida for the purpose of the service of said præcipe for record and amended præcipe for record and the refiling of the said præcipe for record and amended præcipe for record after said service of the same; (22) amended præcipe for record; (23) notice of præcipe indicating portions of the record to be incorporated into the transcript upon appeal; (24) statement of evidence.

Dated Jacksonville, Florida, September 18, 1930.

(Sgd.) WILBURN P. HUGHES,
United States Attorney,

(Sgd.) H. F. MCCONNELL,
Special Attorney, Bureau of Internal Revenue,
Washington, D. C.,

(Sgd.) RAYMOND F. BROWN,
Special Attorney, Bureau of Internal Revenue,
Miami, Florida.,

Attorneys for Peter H. Miller, Individually and as Collector of Internal Revenue for the District of Florida, Defendant and Plaintiff in Error.

(Indorsed on back as follows:)

Received this writ at Jacksonville, Florida, September 18, 1930, and executed it at Jacksonville, Florida, the same day, by exihibiting this original writ and delivering a true copy hereof to W. E. Nicholson, secretary & treasurer of the Standard Nut Margarine Company of Florida, a corporation, making known to him the nature of same.

Fees: $2.00.

C. N. HILDRETH, Jr.,
U. S. Marshal,
By (Signed) FRANK A. KOPP, *Deputy.*

Further executed this writ at Jacksonville, Florida, September 18, 1930, by exhibiting this original writ and delivering a true copy hereof to E. T. McIlvaine, of the firm of Milam, McIlvaine &
76 Milam, solicitors for the Standard Nut Margarine Company of Florida, a corporation.

Fees: $2.00.

C. N. HILDRETH, Jr.,
U. S. Marshal,
By (Signed) W. W. WARD, Jr., *Deputy.*

1844—28—110. Received by U. S. Marshal, So. Dist. of Fla., Sept. 18, 1830, Jacksonville.

[File endorsement omitted.]

In United States District Court

[Title omitted.]

Amended præcipe for record

Filed Sept. 18, 1930

The clerk of the above-styled court is hereby requested and directed to prepare and certify a transcript of the record in the above-styled cause, for the use of the United States Circuit Court of Appeals for the Fifth Circuit by including therein the following papers:

1. Bill of subpœna.
2. Chancery subpœna.
3. Answer of defendant.
4. Preliminary injunction.
5. Injunction bond.
6. Motion of defendant for leave to file amended answer.
7. Stipulation as to filing of amended answer.
8. Order allowing filing of amended answer.
9. Amended answer of defendant.
10. Final decree in favor of complainant and making temporary injunction permanent.
11. Notice of appeal.

12. Petition for appeal.
13. Assignment of errors.
14. Prayer for reversal.
15. Order allowing appeal.
16. Præcipe for record.
17. Amended præcipe for record.
18. Motion for an order allowing the withdrawal of the citation from the office of the clerk of the United States Dis-
77 trict Court for the Southern District of Florida for the purpose of the service of said citation and the refiling of the said citation after said service of the same.
19. Order allowing the withdrawal of the citation from the office of the clerk of the United States District Court for the Southern District of Florida for the purpose of the service of said citation and the refiling of the said citation after said service of the same.
20. Motion for an order allowing the withdrawal of the præcipe for record and the amended præcipe for record from the office of the clerk of the United States District Court for the Southern District of Florida, for the purpose of the service of said præcipe for record and amended præcipe for record and the refiling of the said præcipe for record and amended præcipe for record after said service of the same.
21. Order allowing the withdrawal of the præcipe for record and the amended præcipe for record from the office of the clerk of the United States District Court for the Southern District of Florida, for the purpose of the service of said præcipe for record and amended præcipe for record and the refiling of the said præcipe for record and amended præcipe for record after said service of the same.
22. Amended præcipe for record.
23. Notice of præcipe indicating portions of the record to be incorporated into the transcript upon appeal.
24. Statement of evidence.

(Sgd.) WILBURN P. HUGHES,
United States Attorney,

(Sgd.) H. F. MCCONNELL,
Special Attorney, Bureau of Internal Revenue,
Washington, D. C.,

(Sgd.) RAYMOND F. BROWN,
Special Attorney, Bureau of Internal Revenue,
Miami, Fla.,
Attorneys for Peter H. Miller, Individually and as Collector of Internal Revenue for the District of Florida,
Defendant and Plaintiff in Error.

(Indorsed on back as follows:)

Received this writ at Jacksonville, Florida, September 18, 1930, and executed it at Jacksonville, Florida, the same day, by exhibiting this original writ and delivering a true copy hereof to W. E. Nichol-

Q. You are paying a ten-cent tax, of course, on that?

A. Oh, yes.

Q. Has the Higgins Nut Product interfered in that business in any way?

A. Yes, sir.

Q. The Higgins product has interfered with your artificially colored oleomargarine that you are paying a tax on?

A. Yes.

Q. How much would you say it has interfered with that business as a competitor?

A. Well, that is a matter of guesswork. You can't tell what is working on your market, Mr. McConnell. There are a thousand and one conditions.

Q. Have you any idea, from your business, your competitors, how they have eaten in on your business?

A. There are three or four of these products on the market, and they all tend to upset your program. I know that, going out to the trade we would have a customer—licensed customer on colored standard nut margarine, the regular oleomargarine, as we call it; a salesman would come back to me and say, "Well, he has got Penosbscot"; "He has got Higgins"; "He has got Nu-ine"; "Nut-Z-Al"; and "Don't want any of our stuff; too high."

Q. How does the water content of your colored oleomargarine compare with the Southern Nut Product? About the same, isn't it?

A. You get more water in the nut margarine than you will in the nut product, as a rule.

Q. How much water?

A. Probably ten per cent more.

Q. How is the salt content? The same?

A. The salt content is approximately the same.

Q. And they are manufactured in the same way, with the exception of churning one in water and the other in milk?

A. That is correct; and of course, the preservative.

60 Q. Have you ever checked up to find out how many of these other so-called nut-oleomargarine products are on the market here, the same as the Higgins people?

A. Now?

Q. Yes.

A. There are none, to my knowledge, at this time.

Q. Were there ever any others down here?

A. Yes, sir.

Q. Did they ever interfere with your business in any way as a competitor?

A. Yes, sir.

Q. Seriously?

A. Before we defended ourselves with a product of the same nature they interfered with our business seriously.

Q. So that these nut products, then, were interfering with your business of artificially colored oleomargarine?

A. That is correct; also uncolored oleomargarine.
Q. What?
A. Also uncolored oleomargarine.
Q. Uncolored oleomargarine?
A. Yes.
Q. Why was that, do you know? What was the reason for it?
A. Just the same reason, that if we are in a store we will say with uncolored oleomargarine——
Q. Speaking of the colored products.
A. I want to demonstrate this way—and this merchant puts on a big sale on compound lard on Saturday; we do very little business that day. It interferes with our sales. These products did, too. They interfered more particularly with the colored margarine, which was a large per cent of it being used for cooking, because they didn't have to pay this tax. There was interference, to answer your question.
Q. You are voluntarily paying all the tax on these products now?
A. We are told by the revenue department that these products are taxable.
Q. I say, ever since October——
A. I don't say we are voluntarily paying this tax, Mr. McConnell. We are not, because we certainly don't want to pay it.
Q. Well, I mean the Government is not threatening to seize your property, or anything of that kind?
A. Well, there is instructions out that it is taxable.
Q. The Government hasn't threatened to seize your property if the tax isn't paid?
A. They have not. They made this assessment on us and sent a deputy to see us.
Q. And you know the collector has been advised not to seize any property or anything of the kind, don't you, without instructions from Washington?
67 A. The letter that he received had that wording.
Q. To that effect. And you knew the department in Washington were making no move to collect any of this tax until the matter had reached the Supreme Court in the Harrey-Taylor case, did you not? You were advised of that at the conference, by the commissioner in Washington?
A. Oh, I couldn't say that they weren't going to collect any tax.
Q. Wasn't that the purport of the conversation at the time you were in conference with the commissioner in Washington, until this matter was finally determined by the Supreme Court?
A. I have heard so much conversation on this subject——
Q. But you were at the conference in the commissioner's office?
A. I was there in June at the conference.
Q. And you know there has been no instance where the Government has attempted to collect or enforce collection of this tax on any product in the United States?

taxable as oleomargarine. As a result of that decision the then Commissioner of Internal Revenue, with the approval of the then Secretary of the Treasury of the United States, published and promulgated Treasury Decision 3590, which was the text of the above-mentioned decision, and further informed all concerned that Nut-Z-All had been held by the court not to be oleomargarine and not taxable as oleomargarine. On August 20, 1924, the then Deputy Commissioner of Internal Revenue, in the reply to an inquiry made to the then Commissioner of Internal Revenue by the Institute of
83 Margarine Manufacturers, an association of oleomargarine manufacturers, as to the taxability of said product Nut-Z-All, stated:

"The product 'Nut-Z-All' was held by this office taxable as oleomargarine, but the decision was contested in the case of Higgins Manufacturing Company v. Page (297 Fed. 644), wherein this product was held by the court to be not made in imitation or semblance of butter and not taxable as oleomargarine. The court, having held the product to be not taxable as oleomargarine, the fact that retailers advertise and sell it as butter, or as a substitute for butter, would not render them or the manufacturers liable under the internal revenue law."

Notwithstanding the above-mentioned decision in the case of Higgins Manufacturing Company v. Page, the issuance of Treasury Decision 3590 based thereon, and the above-quoted statement contained in the reply to the inquiry of the Institute of Margarine Manufacturers, all of which were given extensive publicity throughout the trade, the then Commissioner of Internal Revenue, with the approval of the then Secretary of the Treasury, endeavored by Treasury Decision 4006, dated April 1, 1927, again to declare products similar to Nut-Z-All taxable as oleomargarine, if colored to look like butter.

In July, 1927, the said Higgins Manufacturing Company filed in the District Court of the United States for the District of Rhode Island a petition for a temporary injunction against Frank A. Page, as collector of internal revenue for the District of Rhode Island, asking the court to restrain the said collector of internal revenue from collecting a tax on Nut-Z-All and similar products as on oleomargarine. The injunction so prayed for was granted on July
84 18, 1927, and at the time of granting said injunction the court rendered an opinion which is reported in Higgins Manufacturing Company v. Page (20 Fed. (2) 948). In July, 1927, the Baltimore Butterine Company, of Baltimore, Maryland, petitioned the Supreme Court of the District of Columbia for a temporary and permanent injunction against the then Commissioner and Deputy Commissioner of Internal Revenue to restrain them from endeavoring to enforce said Treasury Decision 4006 against its nut product, Nu-ine, which was identical in content and appearance with plaintiff's Southern Nut Product, and which was in content and appearance identical with Nut-Z-All. After hearing and due consideration,

that court granted a temporary injunction and rendered an unreported opinion, which stated:

"I agree with the reasoning of the decision of Judge Lowell of the District Court of Rhode Island in Higgins Manufacturing Co. v. Page; that is one of the cases to which the Supreme Court referred in Dodge v. Brady (240 U. S. 122) of extraordinary and exceptional circumstances.

"The bill alleges that the substance 'Nu-ine' involved in this case is the same as 'Nut-Z-All,' which Judge Brown, of the District Court, held not subject to taxation under the oleomargarine act. Yet in spite of this judicial holding the defendant has attempted by a regulation to make all substances like to that involved in this suit taxable under the act. It is clear that the defendant by means of a mere regulation can not enlarge the provisions of the act, and such a regulation can not be enforced. There would be no end to litigation if the defendant should persist in levying a tax after the courts have held the tax invalid, and the injury to the plaintiff would be irreparable and the amount inascertainable."

On December 16, 1927, that court made said injunction
85 permanent. In December, 1927, the United States District Court for the District of Rhode Island made permanent the temporary injunction theretofore granted against said Page as collector of internal revenue for the district of Rhode Island. No appeals were taken from any of the above-mentioned decrees. The plaintiff engaged in the manufacture of its product, Southern Nut Product, after the above-mentioned decisions had been rendered. Before engaging in the manufacture of its said product plaintiff made inquiry of the defendant and in reply to that inquiry received from the defendant a letter which contained the following:

"The Standard Nut Margarine Company has the same privileges of making a compound of the kind in question without taxpaying same as oleomargarine as is being enjoyed by those manufacturers who obtained favorable decisions from the courts."

Prior to the institution of this suit the defendant threatened to collect a tax of ten cents per pound upon plaintiff's Southern Nut Product, as upon the manufacture of artificially colored oleomargarine. In doing so he acted in pursuance of a letter addressed to him by R. M. Estes, Deputy Commissioner of Internal Revenue, which after stating that plaintiff "manufactures a so-called colored cooking compound under the name of 'Southern Nut Product,' which is held to be taxable as colored oleomargarine," and that plaintiff had been assessed the sum of $5,000.00, which covers the tax on
86 50,000 pounds of Southern Nut Product, estimated to have been produced during the month of January, 1929, stated:

"All wholesale and retail dealers in 'Southern Nut Products' and other so-called cooking compounds found on the market in your district should be reported for assessment on subsequent lists unless they hold special tax stamps permitting them to sell colored oleomargarine."

In the manufacture and sale by plaintiff of Southern Nut Product the net profit derived is approximately three cents per pound, and unless immediate relief shall be granted the levy and collection of ten cents per pound tax upon said product heretofore and now being manufactured by plaintiff will render plaintiff insolvent, and in addition make it liable to severe criminal penalties and the forfeiture of its factory and plant in which said product is made, together with all raw materials and manufactured product on hand. The enforecement of the above-mentioned demand of the Deputy Commissioner of Internal Revenue will render hundreds of wholesalers and thousands of retailers who have been and are now handling and selling plaintiff's product liable to said special tax, additional penalties, and severe criminal liabilities. The decree appealed from, which was rendered March 4, 1930, embodied a finding by the court that "the complainant has established the material allegations of the bill of complaint." The transcript contains a statement of evidence which purports to contain the substance of the evidence introduced in the trial of the cause; but documents which were introduced in evidence and were made exhibits, and apparently being mate-
87 rial parts of the evidence, are not set out in the transcript. The record is consistent with the conclusion that the evidence established the material allegations of the bill of complaint.

The following facts, of which we take judicial notic (Jacobs v. United States, 45 Fed. (2) 34) and of which the court below may have taken judicial notice, though no reference to them is found in the record on appeal, have a bearing on questions raised by the record. While this suit was pending in the court below a bill to amend the definition of oleomargarine contained in the oleomargarine act as amended (26 U. S. C. A., §§ 541, 546) was pending in Congress. The report of the Committee on Agriculture of the House of Representatives on that bill stated:

"The purpose of the amendment, in addition to clarifying the language of the act and including the fish oils and fats, as above briefly mentioned, is to bring a third class of fat compounds, in addition to the two specifically enumerated in the existing law, within the definition of oleomargarine and, therefore, within the taxing and regulating power of the Bureau of Internal Revenue. * * *

"These so-called cooking compounds, made in this manner, are not clearly within the definition of oleomargarine as it is stated in the present law, and as this law is interpreted by the courts. * * *

"The evidence before the committee shows that the definition of oleomargarine in the present law is not sufficiently comprehensive to cover the fat and oil compounds that can and are being made to be so nearly like oleomargarine as to mislead the buying public." (Cong. Rec., Feb. 1, 1930, H. R., p. 2996, et seq.)

A Member of the House in advocating the passage of that bill said:

88 "Since the passage of the oleomargarine act there has come into existence in the country a new butter substitute branded

as a cooking compound, but which to all intents and purposes is intended to be and is sold as butter. These new cooking compounds, which we seek to bring within the purview of the oleomargarine law and under its provisions, are made principally of coconut oil, perhaps 80 per cent coconut oil and the balance peanut oil, salt, and water." (Cong. Rec., H. R., Jan. 31, 1930, p. 2907.)

On January 10, 1930, Commissioner of Internal Revenue Lucas wrote a letter to Congress recommending the passage of such a bill, in which he said:

"In view of the injunction granted the Higgins Manufacturing Company, of Providence, R. I., by the District Court of Rhode Island, enjoining the collector from collecting tax on their product manufactured from vegetable oils, salt, water, and artificial coloring, no attempt has been made to assess stamp tax on Higgins Nut Product or to require the payment of special tax by dealers selling the same.

"The Standard Nut Margarine Co., of Jacksonville, Fla., was recently granted a temporary injunction by the United States District Court at Jacksonville, Fla., restraining the collector of internal revenue for this district from the collection of stamp tax upon the manufacture of the plaintiff's Southern Nut Product and from special tax upon its sale at wholesale and retail. It is understood that this case has been set for trial under date of February 24, 1930.

"In all probability numerous other injunction proceedings will be instituted restraining the collection of stamp and special taxes upon the manufacture and sale of these so-called colored cooking compounds, and while the bureau is of the opinion that they are unquestionably made in imitation or semblance of butter and should be subject to the tax imposed under the oleomargarine law, the only satisfactory solution of the problem appears to be through
89 legislation, such as the passage of H. R. 10958, Seventieth Congress, first session, which specifically brings such products within the classification of oleomargarine." (Cong. Rec., H. R., Feby. 1, 1930, p. 2999.)

A letter of the same official to a Senator as to a then pending bill on the subject contained the statement:

"Bill H. R. 6 was drafted to bring these so-called cooking compounds within the definition of oleomargarine as provided in the act of August 2, 1886, as amended by the act of May 9, 1902, and thus avoid the multiplicity of lawsuits and conflicting court decisions with which the Government was threatened in every attempt made to hold such products subject to the oleomargarine law." (Cong. Rec., Senate, May 26, 1930, p. 9930.)

That bill was passed, being approved July 10, 1930. (46 Stat. 1022.) It provided:

"This act shall take effect one year after the date of its enactment."

In May, 1929, the United States District Court for the Southern District of Georgia decided that plaintiff's product, Southern Nut

Product, is not an imitation of butter. (Baltimore Butterine Company v. Talmadge, 32 Fed. (2) 904.) That decision was affirmed by this court prior to the rendition of the decree now under review. (Talmadge v. Baltimore Butterine Co., 37 Fed. (2) 1014.)

The grounds principally relied on in behalf of the defendant to support the contention that the decree under review was erroneous and should be reversed are:

1. That the finding evidenced by the above-mentioned letter
90 addressed to defendant by R. M. Estes, Deputy Commissioner of Internal Revenue, which stated that plaintiff's product, Southern Nut Product, was held to be taxable as colored oleomargarine, and that plaintiff had been assessed the sum of $5,000.00 on that product, was made final and not subject to judicial review by the following provision of section 14 of the oleomargarine act, as amended:

"And such commissioner is authorized to decide what substances, extracts, mixtures, or compounds which may be submitted for his inspection in contested cases are to be taxed under this act; and his decision in matters of taxation under this act shall be final." (24 Stat. 212.)

2. That the maintenance of this suit is forbidden by the statute, which provides that:

"No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." (26 U. S. C. A., § 154.)

3. That this suit is not maintainable, because the Government is an indispensable party to such a suit, and is not a party, or subject to be made a party, thereto.

1. As above indicated, the allegations of the bill and supporting evidence showed the following: The so-called finding, evidenced by the above-mentioned letter of the Deputy Commissioner of Internal Revenue, to the effect that plaintiff's product, Southern Nut Product, is colored oleomargarine, and taxable as such, was made when there was before the official who made that finding no contested case involving the question whether that product was or was not taxable
91 under the law then in force. The way in which that action appears to have been taken persuasively indicates that it was based on an ex parte investigation, without any hearing of which plaintiff was notified, without plaintiff being given an opportunity to present evidence, and without the introduction or consideration of any evidence having a tendency to prove that plaintiff's product is such a one as was covered by the statute then in force. Before that action was taken several courts, as above stated, had decided in contested cases, to which the Commissioner of Internal Revenue, or his subordinate, was a party, that a nut product in content and appearance identical with appellee's product, Southern Nut Product, was not oleomargarine within the meaning of the statute then in force (21 U. S. C. A., § 25) and was not taxable under that statute, and none of those decisions had been brought into question by an appeal therefrom. Before the action of the

Commissioner of Internal Revenue in holding Southern Nut Product to be taxable as colored oleomargarine was proved in the court below in the trial which resulted in the decree now under review, this court had affirmed a decision to the effect that that product is not an imitation of butter. At the time of the admission in the court below of evidence of that action of the Commissioner of Internal Revenue the Congress had before it for consideration a recommendation of that official that the then existing law be so amended as to bring such products within the classification of oleomargarine, the document containing that recommendation showing that that official was of opinion, not that such products were subject to the tax
92 imposed by the law then in existence, but that they should be subject to such tax. At that time pending proceedings in Congress indicated that that body recognized that a change of the then existing law was required to make such products as plaintiff's Southern Nut Product subject to the tax imposed by the oleomargarine act. The evidence persuasively indicated that the action under consideration, whereby plaintiff's product, Southern Nut Product, was held to be taxable as colored oleomargarine, was unsupported by any evidence tending to prove that that product differed in any material respect from products which repeatedly had been judicially determined not to be subject to the tax imposed by the oleomargarine act, or that that product, in any respect was other than the one in the manufacture of which plaintiff engaged after having been informed by the defendant to the effect that it was not subject to that tax. It appeared from the evidence that that action was taken in such circumstance that the basis of it was so unsubstantial as to be frivolous, that it was taken in contemputuous disregard of unappealed from court decisions to the effect that the then existing law imposed no tax on such a product, and amounted to an administrative attempt to coerce the payment of money the exaction of which the official who took that action thought ought to be authorized by law, but which he did not really believe was authorized by the then existing statute as uniformly construed by the courts. The basis of the claim that plaintiff's product was taxable as colored oleomargarine was so unsubstantial as to be frivolous, and the holding that it was so taxable was so arbitrary and capricious that
93 it amounted to a mere administrative fiat, which, in effect, was no decision at all. (Benderup v. Pathe Exchange, 263 U. S. 291, 306; Silberschein v. United States, 266 U. S. 221, 225; Interstate Com. Comm. v. Louisville & Nashville R. Co., 227 U. S. 88, 91.) We conclude that the official action now in question, which purported to hold that plaintiff's product, Southern Nut Product, was taxable as colored oleomargarine, and whereby a so-called tax in the sum of $5,000.00 was attempted to be assessed, was not a decision within the meaning of the above set-out statutory provision, and had no binding or conclusive effect.

2. In several cases in which the Supreme Court of the United States had under consideration the above set-out statute forbidding

the maintenance of any suit for the purpose of restraining the assessment or collection of any tax, that court explicitly recognized that that statute does not prevent an injunction in a case apparently within its terms in which some extraordinary and entirely exceptional circumstances make its provisions inapplicable. (Hill v. Wallace, 259 U. S. 44, 62; Bailey v. George, ib. 16; Dodge v. Brady, 240 U. S. 122, 126.) Though the court's statements to that effect were not necessary for the decision of any of the cases in which they were made, those statements plainly indicate a deliberate conclusion of that court as to the meaning and scope of that statute. In view of that court's expressed conclusion, certainly we would not be warranted in attributing to that statute the meaning or effect of preventing the interference by a court with the enforcement of any attempted exaction by a tax official under the guise of an as-
94 sessed tax, however, extraordinary and entirely exceptional the circumstances may be. That above-mentioned circumstances attending the attempted imposition of the purported tax the enforcement of which was enjoined by the decree appealed were extraordinary and entirely exceptional cannot fairly be denied. The product which was the subject of that threatened exaction, a mixture or compound consisting of cocoanut oil, peanut oil, salt, water, and harmless coloring matter, was not in existence until long after the enactment of the oleomargarine act. It was not made in imitation or semblance of butter, and was not a mixture or compound described in section 2 of that act (26 U. S. C. A., § 541), which covered no mixture or compound containing any vegetable ingredient other than "vegetable oil annatto," which is a dyeing or coloring material used for coloring butter, cheese, etc. Nothing in that statute indicated an intention to tax such a mixture or compound as plaintiff's Southern Nut Product, or that the lawmakers, in enacting that statute, contemplated the possibiliy of such a mixture or compound being devised and coming into competition with butter. Before the so-called tax was attempted to be assessed several courts, in cases to which the Commissioner of Internal Revenue or his subordinate was a party, had decided that products identical in content and appearance with plaintiff's were not subject to the tax attempted to be imposed. The failure to appeal from any of those decisions amounted to an admission by the Commissioner of Internal
95 Revenue that an attempt to impose that tax on such products as plaintiff's Southern Nut Product is not legally sustainable. The claim of the defendant that he was legally authorized to coerce the payment of the so-called tax, when that claim was attempted to be sustained in the trial which resulted in the decree appealed from, was made in such circumstances as to be merely colorable, in effect a frivolous pretense that his action in that regard was in compliance with an official duty imposed by law, that claim then being made after it had been judicially determined several times, in suits to which defendant's official superior or the latter's subordinate was a party, that the statute relied on imposed no tax on products of identically the same kind as plaintiff's Southern Nut Product; after the

defendant had influenced the plaintiff to engage in the manufacture of that product by informing him that it was not taxable under the oleomargarine act; after the defendant's official superior, by failing to have any of the just-mentioned decision appealed from and by recommending to Congress the enactment of a statute imposing a tax on such products, had in effect admitted that those products were not taxable under the then existing law as that law was construed by the courts, and after the lawmakers, by taking steps to impose a tax on those products, had recognized that a change of law was required to make them subject to be taxed. We think it would be a manifest perversion of the statute in question to permit it to be made the means of enabling a tax official to obtain exemption from
96 being restrained from enforcing an exaction which no legislation purports to provide for, and which, in suits to which that official or his official superior was a party, have been judicially determined not to be authorized by law. We conclude that the court, in awarding the injunction complained of, did not, within the meaning of the statue now under consideration, restrain the assessment or collection of any tax. The continued prosecution of the appeal in this case in the circumstances disclosed amounts to an attempt by a tax official to enforce the collection of a tax before, under the law which provides for it, authority to assess or collect that tax is conferred on anyone.

3. The United States is not a necessary party to this suit, the object of which is to restrain threatened illegal conduct of a Federal official violative of rights of the plaintiff. The exemption of the United States from suits does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded or threatened to invade. (Philadelphia Co. v. Stimson, 223 U. S. 605, 619.)

We conclude that in no ground urged is the decree under review erroneous or subject to be reversed.

That decree is affirmed.

97 In United States Circuit Court of Appeals

No. 6049

PETER H. MILLER, INDIVIDUALLY, AND AS COLLECTOR OF INTERNAL REVENUE for the District of Florida

VERSUS

THE STANDARD NUT MARGARINE COMPANY OF FLORIDA, A CORPORATION

Judgment

April 22, 1931

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Florida and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said district court in this cause be, and the same is hereby, affirmed.

98 In United States Circuit Court of Appeals

[Title omitted.]

Order staying mandate

Filed May 19, 1931

On consideration of the application of the appellant in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, it is ordered that the issue of the mandate of this court in said cause be, and the same is, stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, and that due proof of service of notice thereof under paragraph 3 of rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 19th day of May, 1931.

(Signed) RUFUS E. FOSTER,
United States Circuit Judge.

99 [Clerk's certificate to foregoing transcript omitted in printing.]

100 Supreme Court of the United States

Order allowing certiorari

Filed October 19, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Indorsement on cover:] File No. 36065. U. S. Circuit Court of Appeals, Fifth Circuit, term No. 251. Peter H. Miller, individually and as collector of internal revenue for the district of Florida, petitioner, vs. The Standard Nut Margarine Company of Florida. Petition for a writ of certiorari and exhibit thereto. Filed July 22, 1931. File No. 36065.

U. S. GOVERNMENT PRINTING OFFICE: 1931

son, secretary-treasurer of the Standard Nut Margarine Company of Florida, a corporation, making known to him the nature of same.

Fees: $2.00.

C. N. HILDRETH, Jr.,
U. S. S. Marshal,

By (Signed) FRANK A. KOPP, *Deputy.*

78 Further executed this writ at Jacksonville, Florida, September 18, 1930, by exhibiting this original writ and delivering a true copy hereof to E. T. McIlvaine, of the firm of Milam, McIlvaine & Milam, solicitors for the Standard Nut Margarine Company of Florida, a corporation.

Fees: $2.00.

C. N. HILDRETH, Jr.,
U. S. S. Marshal,

By (Signed) W. W. WARD, Jr., *Deputy.*

1844—28—110. Received by U. S. Marshal, So. Dist. of Fla., Sept. 18, 1930, Jacksonville.

[File endorsement omitted.]

[Clerk's certificate to foregoing transcript omitted in printing.]

79 [Minute entry of argument and submission Feb. 23, 1931, omitted in printing.]

80 In United States Circuit Court of Appeals for the Fifth Circuit

No. 6049

PETER H. MILLER, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE for the District of Florida, appellant

VERSUS

THE STANDARD NUT MARGARINE COMPANY OF FLORIDA, A CORPORATION, appellee

APPEAL from the District Court of the United States for the Southern District of Florida

Harrison F. McConnell, special attorney, Bureau of Internal Revenue; Raymond F. Brown, special attorney, Bureau of Internal Revenue, and W. P. Hughes, United States attorney (Harrison F. McConnell, special attorney, Bureau of Internal Revenue, Raymond F. Brown, special attorney, Bureau of Internal Revenue, W. P. Hughes, United States attorney, and C. M. Charest, General Counsel, Bureau of Internal Revenue, on the brief), for appellant.

George N. Murdock, A. Y. Milam, Robt. R. Milam, and E. T. McIlvaine (Geo. N. Murdock, A. Y. Milam, Robt. R. Milam, and E. T. McIlvaine on the brief), for appellee.

Before FOSTER, HUTCHESON, and WALKER, Circuit Judges

Opinion of the court

Filed April 22, 1931

WALKER, Circuit Judge:

This is an appeal from a final decree rendered in a suit
81 brought by the appellee, The Standard Nut Margarine Company of Florida, a corporation, against the appellant, individually and as collector of internal revenue for the District of Florida, under which the appellant was perpetually restrained and enjoined "from collecting or attempting to collect, directly or indirectly, from the plaintiff (the appellee), or any dealer selling plaintiff's product, Southern Nut Product, any pretended tax or imposition purporting to be levied or assessed against the plaintiff or said dealers under the oleomargarine act of August 2, 1896, as amended, on account of the manufacture and sale of the said Southern Nut Product referred to in the petition herein and manufactured by plaintiff." The allegations of appellee's petition or bill, filed December 26, 1926, show as follows, the parties being herein referred to by their designation in the court below: Plaintiff is engaged, and has been engaged for more than two years, in the manufacture and sale in interstate commerce of a nut product known as Southern Nut Product, manufactured and sold under its own distinctive name, said name not being in imitation of the distinctive name of any other product; said name is accompanied on the same label and brand with the name of the place where it is manufactured or produced; and said product contains no added poisonous or deleterious ingredients. Southern Nut Product is a mixture or compound consisting of cocoanut oil, peanut oil, salt, water, and harmless coloring matter, manufactured and sold for cooking, baking, and seasoning purposes. Southern Nut Product is packed and sold only in one-pound cartons,
82 a sample of which was attached to the bill, and plaintiff sells and ships it to a great number of firms and persons located in many States of the United States outside of the State of Florida. Prior to plaintiff engaging in the manufacture and sale of said Southern Nut Product an action at law had been brought against one Page, as collector of internal revenue for the district of Rhode Island, for the purpose of recovering from said collector the amount of taxes paid under protest by the Higgins Manufacturing Company on a product manufactured and sold by that company known as Nut-Z-All, which product was manufactured in the same way and of the same ingredients as Southern Nut Product is manufactured by plaintiff. After hearing the evidence submitted on behalf of both the plaintiff and the defendant in that case, it was held by the court that said product Nut-Z-All was not made in imitation or semblance of butter or intended to be sold as butter or for butter, and hence under the law was not oleomargarine and not

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CHARLES ELMORE CROPLEY
CLERK

No. 251

In the Supreme Court of the United States

OCTOBER TERM, 1931

PETER H. MILLER, INDIVIDUALLY, AND AS COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF FLORIDA, PETITIONER

v.

THE STANDARD NUT MARGARINE COMPANY OF FLORIDA, A CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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In the Supreme Court of the United States

OCTOBER TERM, 1931

No. ——

PETER H. MILLER, INDIVIDUALLY AND AS COLLECTOR of Internal Revenue for the District of Florida, petitioner

v.

THE STANDARD NUT MARGARINE COMPANY OF Florida, a Corporation

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

PETITION

The Solicitor General, on behalf of the petitioner, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit entered in the above-entitled cause on April 22, 1931. (R. 88.)

STATEMENT

The respondent taxpayer is a Florida corporation engaged in the manufacture and sale of a product known as Southern Nut Product, a mixture or

compound of cocoanut oil, peanut oil, salt, water, and harmless coloring matter. (R. 1.) Prior to the commencement of this action the Commissioner of Internal Revenue had decided that this compound was taxable as colored oleomargarine and assessed a tax of $5,000 on 50,000 pounds of the compound estimated to have been produced during the month of January, 1929. (R. 9.) Suit was brought to restrain collection of any of this tax.

The bill of complaint (R. 11) alleges that Southern Nut Product is not oleomargarine as that term is defined in Section 2 of the Act of August 2, 1886, c. 840, 24 Stat. 209 (U. S. C., Title 26, Sec. 541; p. 7, *infra*), and that its taxaton is therefore not justified or authorized by that Act. Petitioner's answer to the bill of complaint alleged that Southern Nut Product is artificially colored oleomargarine and is taxable pursuant to the Act. (R. 32.) The answer also asserted that no injunction should be issued because of the provisions of Section 3224 of the Revised Statutes (*infra,* p. 7), and because the plaintiff had an adequate and complete remedy at law. (R. 32.)

A preliminary injunction was issued by the District Court for the Southern District of Florida. (R. 23.) Thereafter a hearing was held, at which the Collector introduced no testimony, since he contended that Section 3224 of the Revised Statutes prevented the issuing of an injunction. After this hearing the court decided the product was not taxable and the injunction was made permanent by

the final decree. (R. 33.) The petitioner appealed to the United States Circuit Court of Appeals for the Fifth Circuit, which affirmed the District Court.

SPECIFICATION OF ERRORS TO BE URGED

1. The Circuit Court of Appeals erred in holding that an injunction was properly granted notwithstanding the prohibition of Section 3224 of the Revised Statutes.

2. The Circuit Court of Appeals erred in holding that the product of the respondent was not taxable as oleomargarine under the Act of August 2, 1886, c. 840, 24 Stat. 209.

REASONS FOR GRANTING THE WRIT

1. The Commissioner of Internal Revenue has general jurisdiction of the assessment and collection of all taxes imposed by any law providing internal revenue. (R. S., Sec. 321; U. S. C., Title 26, Sec. 2.) The holding of the Circuit Court of Appeals that the Standard Nut Product was not taxable and that therefore the issuing of an injunction did not restrain the assessment or collection of any tax (R. 87) is in conflict with the decisions of this Court as to the applicability of Section 3224 of the Revised Statutes. *State Railroad Tax Cases,* 92 U. S. 575, 613; *Snyder* v. *Marks,* 109 U. S. 189, 192, 193; *Dodge* v. *Osborn,* 240 U. S. 118; *Dodge* v. *Brady,* 240 U. S. 122; *Bailey* v. *George,* 259 U. S. 16; *Graham* v. *duPont,* 262 U. S. 234. Cf. *Smallwood* v. *Gallardo,* 275 U. S. 56.

2. The holding of the Circuit Court of Appeals is in conflict with the decisions of the Circuit Court of Appeals for the Seventh Circuit in *Reinecke* v. *Peacock*, 3 F. (2d) 583, certiorari denied, 268 U. S. 699, reversing a decree enjoining the Collector of Internal Revenue from collecting taxes on the income of a trust distributed prior to assessment, and *Reinecke* v. *O. D. Jennings & Co.*, 16 F. (2d) 927, certiorari denied, 274 U. S. 753, reversing a decree enjoining the collection of a tax on slot machines asserted by the taxpayer not to be included within the definition of the statute. The decision of the Circuit Court of Appeals in this case is also in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Hernandez* v. *McGhee*, 294 Fed. 460, reversing a decree enjoining the collection of income taxes notwithstanding the contention of the taxpayer that he had received no income subject to tax.

3. The Government contends that the courts below erred in holding that the product of the respondent was not oleomargarine within the meaning of the Act of August 2, 1886. The question of the taxability of this product turns largely upon the construction of the Act of August 2, 1886, c. 840, 24 Stat. 209 (p. 7, *infra*). The contention of the Government finds support in *Harrow-Taylor Butter Co.* v. *Crooks* (W. D. Mo.), affirmed, 41 F. (2d) 627 (C. C. A. 8th). See also the discussion of the taxability of this same product in *Standard*

Nut Margarine Company of Florida v. *Jones, Collector* (E. D. S. C.), which decision is not reported but is printed in the Appendix (*infra*, pp. 16–27).

4. Although this Act of August 2, 1886, has been amended by the Act of July 10, 1930, c. 881, 46 Stat. 1022; so that the question of construction of the 1886 Act will not arise in taxes accruing after July 10, 1931, the question involved in the instant case, as applied to the Act of 1886, is one of public interest and of great importance to the Government in the administration of the revenue law. Approximately $2,000,000 in taxes have accrued against this and similar products under the taxing Act here involved. Numerous bills in equity have been filed to enjoin the collection thereof, the final determination of which await the action of this Court in this case.

It is therefore respectfully submitted that a petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fifth Circuit should be granted.

THOMAS D. THACHER,
Solicitor General.

JULY, 1931.